Nos. 775 945 MISC.

Office-Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965
No .....

JAMES R. GREEN, doing business as JIM GREEN'S TRUCKING COMPANY,

Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Respondent.

MOTION FOR LEAVE TO FILE A PETITION FOR A COMMON LAW WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA, OR TO THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, AND THE ACCOMPANYING PETITION, TO COMPEL SAID COURT OR SAID COMMISSION TO CERTIFY A TRANSCRIPT OF THE COMPLETE RECORD HEREIN, AND PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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MOTION FOR LEAVE TO FILE A PETITION FOR A COMMON LAW WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA, OR TO THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, AND THE ACCOMPANYING PETITION, TO COMPEL SAID COURT OR SAID COMMISSION TO CERTIFY A TRANSCRIPT OF THE COMPLETE RECORD HEREIN, AND PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Motion for Leave to File a Petition for a Common Law Writ of Certiorari to the Supreme Court of the State of California or to the Public Utilities Commission of the State of California.

To the Supreme Court of the United States:

Petitioner, James R. Green, doing business as Jim Green's Trucking Company, complaining of Roger J.

Traynor, Chief Justice, and the Associate Justices of the Supreme Court of the State of California, and William I. Sullivan, Clerk of said Supreme Court, and of Frederick B. Holoboff, President, and George G. Grover, William M. Bennett, Peter E. Mitchell, and Everett C. McKeage, Commissioners of the Public Utilities Commission of the State of California, respectfully moves this Court to grant petitioner leave to file his petition for a common law writ of certiorari to the Supreme Court of the State of California, or to the Public Utilities Commission of the State of California, whichever tribunal shall be deemed by this Court to be the appropriate one, to compel said Court or said Commission to certify a transcript of the complete record herein, in aid of the jurisdiction of this Court, as authorized by 28 U.S. Code Section 1651(a), which petition is herewith tendered and is hereby referred to and made a part of this motion for all purposes. Petitioner also submits with the petition the portion of the record certified to by the Clerk of the Supreme Court of the State of California, a copy of the brief of the Commission staff before the Public Utilities Commission and a copy of the reporter's transcript of the hearing before the Public Utilities Commission, neither of which is certified as required by Rule 31(2) of the Rules of this Court.

Petitioner prays that said petition be filed and set down for hearing, and for other relief, general and special.

Respectfully submitted,

By THOMAS S. TOBIN,
Attorney for Petitioner.

Petition for a Common Law Writ of Certiorari to the Supreme Court of the State of California, or to the Public Utilities Commission of the State of California, to Compel Said Court or Said Commission to Certify a Transcript of the Complete Record Herein, and Petition for a Writ of Certiorari to the Supreme Court of the State of California.

Petitioner prays that a common law writ of certiorari issue either to the Supreme Court of the State of California or to the Public Utilities Commission of the State of California to compel said Court or said Commission to certify a transcript of the complete record herein in aid of the jurisdiction of this Court, and that a writ of certiorari issue to review the order of the Supreme Court of the State of California, entered in the above-entitled case on July 28, 1965.

Citations to Opinions Below.

The opinion and order of the Public Utilities Commission of the State of California [R. 80-93], printed in Appendix B hereto, *infra*, p. 8, is reported at 63 Cal. P.U.C. 425. The order of the Supreme Court of the State of California denying review of the decision of the Public Utilities Commission [R. 188] is unreported, as is the order of that court permitting withdrawal of petitioner's motion for a stay of execution to permit application to the Supreme Court of the United States for a writ of certiorari pursuant to a stipulation between the parties [R. 223].

Jurisdiction.

The opinion and order of the Public Utilities Commission of the State of California was entered on Oc-

tober 6, 1964 [R. 80; Appendix B, p. 8]. The Commission denied rehearing on February 3, 1965 [R. 61]. The California Supreme Court entered an order denying review, without opinion, on July 28, 1965 [R. 188]. The jurisdiction of this Court is invoked under 28 U.S. Code, Section 1257(3).

Questions Presented.

1. Whether a state administrative agency may, consistent with the Fifth Amendment's privilege against self-incrimination, compel the operator of a business entity subject to agency regulation to prepare and file a written report evaluating his past business records and abstracting therefrom admitted infractions of the law which are criminally punishable.

2. Whether a state administrative agency may except from the operation of otherwise applicable minimum rate tariffs a large class of specialized contract carriers using subhaulers and permit them to employ subhaulers at subhauler rates, and yet apply the tariffs to those contract carriers who solidify goodwill by rendering services of any kind for their shippers, totally unrelated to transportation or the costs of transportation and without an ascertained money value, and prohibit the latter from employing subhaulers at subhauler rates, without violating the Fourteenth Amendment's guarantees of due process and equal protection.

3. Whether this Court should, in aid of its jurisdiction, issue a common law writ of certiorari either to the Supreme Court of the State of California or to the Public Utilities Commission of the State of California, whichever tribunal is the appropriate one, to compel that Court or that Commission to certify a transcript of the complete record herein to this Court.

Constitutional Provisions and Statutes Involved.

The Constitutional provisions involved are Amendments V and XIV to the Constitution of the United States. Amendment V provides:

> ". . . (N)or shall any person . . . be compelled in any criminal case to be a witness against himself. . . ."

And Amendment XIV provides that:

> ". . . (N)or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case and How the Federal Questions Are Presented.

By its order dated October 29, 1963, the Commission instituted an investigation into the operations, rates, charges and practices of petitioner, James R. Green, doing business as Jim Green's Trucking Company [R. 80]. The order charged petitioner with violations of Sections 3667 and 3668 of the Public Utilities Code (Calif. Stat. 1951, c. 764, p. 2119, Sections 3667 and 3668) and with violations of an earlier order of the Commission, in 1961, to which the petitioner in the present case was not a party.

Jim Green's Trucking Company is a sole proprietorship, organized and doing business under the laws of California, and operating as a contract carrier, principally for one shipper, Lewis Food Company, by employing the facilities of subhaulers, which, according to the undisputed evidence, is a common practice in the transportation industry [R. 133; Appendix D, *infra*, p. 103; Tr. 98].[1]

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[1]Citations herein with the prefix "Tr." refer to the reporter's transcript of the hearing before the Public Utilities Commission of

It is generally recognized that prime carriers, who seldom have access to a balanced traffic flow in both directions, need the traffic provided by subhauling transactions to avoid operating without a load on the return movement.[2] The existence of unused backhaul capacity is a symptom of misallocation of resources.[3] If it is assumed that the transportation needs of the economy are best met with a minimum expenditure of resources and that an optimum allocation of resources occurs when the price of each commodity equals the minimum cost to society producing the additional unit of that commodity, then ignoring these factors results in a misallocation. Unused backhaul capacity means that too many carriers are operating with excess capacities and correspondingly low revenues, for the existing amount of resources devoted to the movement of goods is more than the maximum necessary.[4] Widespread excess capacity in the trucking industry, if unremedied, leads to a serious financial demoralization of carriers, resulting in depressed economic conditions, impaired standards of service, rate wars, abuse of the highways and disregard of safety standards, conditions which, in the depression of the Thirties, induced the Public Utilities Commission to enter the field of regulating rate practices of intrastate contract carriers.[5] The

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the State of California, which has never been part of the record of the Supreme Court of California. At all times the transcript has been in the custody of the Commission [R. 227].

[2]*Red Ball Motor Freight v. Shannon*, 377 U.S. 311, 321 (1964).

[3]Pegrum, *Public Regulation of Business*, pp. 5-14 (1959).

[4]Note, *National Transportation Policy and the Regulation of Motor Carriers*, 71 Yale L.J. 307, 309 and 320 (1961).

[5]*Id.*, at p. 309; Dodge, *The Influence of Proprietary Trucking Upon Minimum Rate Policy in California*, 11 Vand. L.R. 1109, 1116-1117 (1958).

California Public Utilities Commission is very much aware of such a possibility. It usually favors a policy of maximum utilization of backhaul capacity and authorizes prime carriers to contract out as subhaulers on the return haul.[6] It has statutory authority to allow deviations from the prescribed minimum rates applicable to prime carriers.[7]

Statutory authority for permitting the practice of subhauling in one form or another has existed in California since 1935.[8] Respondent has conceded that it sanctions the practice of prime carriers engaging the services and facilities of subhaulers to transport property at a rate which is less than the prescribed minimum rate applicable to prime carriers [R. 65].

Petitioner, operating as a prime carrier serving one shipper, the Lewis Food Company, developed his business by engaging the equipment and facilities of subhaulers [R. 80, 83, 86; Appendix D, *infra*, p. 104; Tr. 98]. The advantage of the contract carriage system of transportation over other modes may be attributed to the absence of substantial economies of scale, enabling those carriers to conduct restrictive operations serving a limited number of shippers and performing services tailored to the needs of particular shippers.[9]

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[6]California Public Utilities Commission, Transportation Division, Engineering Section, *Report on the Cost of Transporting Lumber by Motor Vehicle Equipment From Points in Humboldt, Lake, Mendocino, and Sonoma Counties*, Case No. 5432 (1955).

[7]Public Utilities Code Section 3666 (Stat. 1951, c. 764, p. 2118, Section 3666), the complete text of which is printed in the Appendix A, *infra*, at p. 4.

[8]Calif. Stat. 1935, c. 223, p. 881, Section 11; Calif. Stat. 1935, c. 223, p. 882, Section 12 as amended Calif. Stat. 1937, c. 722, p. 2010, Section 10.

[9]Note, *supra*, 71 Yale L.J. 307, 309 (1961).

All contract carriers enjoy, to some extent, the obvious economies of specialized service.[10] Since 1961, petitioner has built his business around the needs of one shipper [R. 83-86; Tr. 83-87]. He left employment with Mayflower Transit, after a number of years, to work for a carrier known as Certified Transport, the carrier which was later ordered to cease and desist operating by an order of the Commission dated May 9, 1961. At the time a woman named Nell V. Lewis was part owner of Certified Transport. James R. Green did some billing and invoicing and other operations for Certified Transport. Then he went to work for the Lewis Food Company where he worked until 1960. In 1960, he married the former Nell V. Lewis. In 1961, he began operating as a carrier serving one shipper, the Lewis Food Company. Although he continued to assist Lewis Food Company in its sales department in an advisory capacity while the Company was training a person to replace him, he received no salary and was reimbursed for only actual expenses [R. 16-17; Tr. 83-87; 91-91].

Petitioner operated his young business efficiently. He specialized in fulfilling the transportation needs of a

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[10]A specialized trucker who can adjust to a single and predictable flow of traffic usually has the best opportunity to minimize cost if traffic volume is large enough to fill up a truck. On the other hand, in the transportation industry, the addition of each new trailer load requires an equally proportionate change in total cost, composed of a vehicle, a driver, and local handling service. And if a carrier's investment in capital equipment must be oriented toward operating on a standby basis to absorb seasonal or unexpected traffic demands, the marginal cost is even higher. Varying traffic needs of different shippers, and flexibility of contract carriers in responding to those needs, point to a proliferation of contract carrier services and a resultant diversity of actual transportation cost factors. Naturally, there are substantial differences in the costs of serving different shippers. And, in the transportation industry, nearly all costs are variable. See Dodge, *supra, The Influence of Proprietary Trucking Upon Minimum Rate Policy in California,* 11 Vand. L.R., p. 1138 (1958).

single shipper, and, in so doing, minimized his own investiment in equipment, using instead the available empty trucks of prime carriers returning to home bases, carriers who had already made that investment in trucks and facilities. The transportation traffic offered by the shipper to Jim Green's Trucking Company was "leased out" to other truckers, based in Northern California, who were looking for subhauls back to their home base, "or otherwise they would have to return empty." As petitioner testified, without contradiction, the practice of subhauling provided these prime carriers, who have already made a substantial investment in capital equipment, with additional compensation they would not otherwise receive. While making subhauls, they were operating under petitioner's prime carrier permit and not under their own permits as prime carriers [R. 17, 31, 85; Tr. 88, 94, 98, 99, Appendix D, *supra*, p. 104].

There was no evidence D. B. Lewis ever dictated or interfered with the rating policies of Jim Green's Trucking Company vis-a-vis the subhaulers; D. B. Lewis had no role in determining whether, if at all, Jim Green's trucking company would pay the subhaulers a smaller amount than that which D. B. Lewis had paid to petitioner. D. B. Lewis had no proprietory interest in petitioner's business and the only connection between the two men was a seven-year personal friendship [R. 27-32; Tr. 122-123].

The order instituting investigation, prepared by the Commission staff, directed an inquiry into the following questions: (1) whether petitioner's operations constituted a device by means of which D. B. Lewis, Nell V. Green (formerly known as Nell V. Lewis), Lewis Food Company, and each of them, were evading the

Commission's order contained in Decision No. 61963; (2) whether petitioner violated Sections 3667 and 3668 of the Public Utilities Code; (3) whether the operating permits issued to petitioner should be amended by inserting a restriction prohibiting petitioner, whenever he engages other carriers for the purpose of transporting shipments or property tendered to petitioner, from paying such other carriers less than the minimum rate and charge established by the Commission; (4) whether petitioner should be ordered to collect or take appropriate action to collect from the shipper, D. B. Lewis, any portion of the minimum rates or charges directly or indirectly refunded or remitted to the shipper; (5) whether, in the event the petitioner were found by the Commission to have committed undercharge violations, petitioner should be ordered to review his records to determine whether other undercharges have occurred in connection with transportation of other shipments handled and charged for in a similar manner, to report to the Commission the results of such review, to collect such additional undercharges from the shipper or persons liable for such charges and report such collection to the Commission; (6) whether petitioner should be ordered to cease and desist from any and all unlawful operations and practices; (7) and whether any or all of the operating authority of petitioner should be cancelled, revoked, or suspended [R. 80-85].

On January 15, 1964, the Commission conducted a public hearing before Examiner Richard D. Gravelle, at Los Angeles, California.

Much of the hearing consisted of evidence introduced by the Commission staff to prove petitioner's business was merely the *alter ego* of the Lewis Food Company

and D. B. Lewis [R. 82]. The record is permeated with testimony by Commission witnesses attempting to establish a close and illegal association between the two, to prove James R. Green was violating an earlier order of the commission, arising out of Case No. 6320, decided May 9, 1961, to which petitioner was not a party. Though staff council prosecuted the case on the *alter ego* theory, the Commission found petitioner innocent on the *alter ego* count and guilty of undercharging [R. 88]. Yet the transcript of the hearing is almost barren of evidence supporting the finding of undercharges. Neither petitioner nor the attorneys for the Commission staff prepared a case intelligently presenting the issue to the Commission [R. 66, 70, 147-148]. At the hearing, the opening witness for the staff described the undercharges as "minor" and "mostly informational" [R. 11, 66]. In its brief, the staff stated, at page 10: "undercharges herein were de minimus." (Appendix C, p. 28). Transportation experts testifying for the staff said small variations, such as those appearing in the samples taken of petitioner's records, might be expected in the normal course of any trucking operation and were very small [Tr. 73-74]. Petitioner hadn't even prepared on the issue of undercharges because statements in the order instituting investigation deceptively induced him to believe undercharges were not really an issue.

Evidence introduced by the staff to prove an *alter ego* relationship between petitioner and the shipper lead the Commission to conclude that although petitioner was not an *alter ego,* his trucking business was merely a "device" to enable the shipper to obtain cheaper transportation but the Commission confused minimum rate evasion with the ordinary features of specialized common car-

riage. For, as indicia of a "device" to evade minimum rate, the Commission simply pointed to characteristics of petitioner's business which demonstrate its specialized nature. Because petitioner had volunteered to the hearing examiner that he had rendered part-time free services as a sales consultant to his one shipper [Tr. 91-92], the Commission concluded that the minimum rate structure had been impaired. It seems that in addition to a background in transportation economics, petitioner also had experience with sales and public relations [Tr. 105]. He offered his services to his one shipper as a sales consultant in order to improve goodwill between the shipper and himself [Tr. 105]. His incentive was the prospect of a larger share of the shipper's traffic [Tr. 105], better than a hidden salary for sales work, and to this end he did indeed utilize his personal skill, and knowledge of sales, to inhance his competitive position vis-a-vis other contract carriers. Yet the Commission based its decision on the proposition that petitioner's transportation operations as a prime carrier are a fraud and a sham, that petitioner is in fact the lowly sales manager of the shipper, paid for his sales services not in a form of a salary but in the form of operating revenues, in excess of a one million dollars a year, which accrue to the sham trucking business [R. 84-85]. The Commission was influenced by evidence from the record, and particularly from petitioner's own testimony, that in addition to rendering part-time free sales advice to the shipper, petitioner did not advertise to the public and had desk in a shipper's sales office, although he had a transportation office on the shipper's premises and another office in his own private residence [R. 67, 84-85]. Moreover, the Commission was impressed by evidence that petitioner did not list him-

self as a carrier in the yellow pages of the telephone directory and could be reached by the use of the shipper's telephone number [R. 69]. These facts, combined with evidence pending to prove the fact that petitioner had admitted from the outset, that he rendered sales services to the shipper, led the Commission to conclude petitioner wasn't even operating a bona fide transportation business.

As a result, petitioner was found guilty of violating Sections 3667 and 3668 of the Public Utilities Code (See Appendix, page 5), ordered to review his own records and report to the Commission all undercharges which occurred between April, 1962 and October, 1964, to correct the undercharges already found and to correct any new undercharges which petitioner may discover, and pay all undercharges to the subhaulers. Finally, the Commission ordered his prime carrier permit to be amended to prohibit him, whenever he renders services for the Lewis Food Company, but not whenever he renders services for anyone else, from using subhaulers and compensating them at subhauler rates. This prohibition was expressly limited to transportation services provided by him for Lewis Food Company. It would be entirely permissible for petitioner to conduct that same kind of business operation for any other kind of shipper, and, as attorney for the commission stated at page 16 of the Answer to his Petition for a Writ Of Review before the Supreme Court of the State of California, "if and when petitioner transports property of other shippers in the future he is under no such restriction." [R. 75]. The opinion and order of the Commission, R. 80-93, is printed in Appendix D hereto.

The decision of the Commission was rendered October 6, 1964, based upon the reporter's transcript of the January 15 hearing, documentary exhibits and other evidence and oral and written arguments by counsel. The only discernible criterion of illegality in petitioner's operation appeared to be that he, as a contract carrier, specialized in fulfilling the transportation needs of a single shipper, and, in so doing, minimized his own investment in capital equipment, using instead the available trucks of prime carriers returning to home bases, carriers who had already made that investment in trucks and facilities. In addition, the Commission made a tenuous assumption, unsupported by evidence and contradicted by its own finding of fact, that there was identity in fact between the shipper, Lewis Food Company and the petitioner. Attorneys for the Commission later explained that although subhauling is legally permissible,

> "Within this pattern of regulation, it is easy to see that in a situation where there is *identity in fact* between a shipper and a prime carrier payments by the shipper of a minimum rate to such prime carrier could amount to nothing more than a paper transaction where subhaulers are used to perform the actual transportation, and a shipper would be able to obtain transportation at the legal minimum rates." [R. 65-66].

And what were the Commission's criteria for "identity in fact"? The Commission had specifically found that Jim Green's Trucking Company was not the *alter ego* of the Lewis Food Company or of D. B. Lewis [R. 84]. But that finding did not prevent the Commission

from concluding there was identity in fact between petitioner and shipper [R. 83]. The opinion stated:

> "We find, as the staff contends, that respondent's services for the shipper constitute an indirect refund to Lewis Food Company and a device whereby Lewis Food Company obtains transportation at a rate less than the minimum." [R. 85].

The opinion included a recital that,

> ". . . steming from respondent's (petitioner here) view of the evidence is the conclusion that for the Commission to impose any sanction upon respondent would exceed the jurisdiction of the Commission and violate respondent's rights to due process and the equal protection of the law . . . respondent has been well represented by counsel and has had the opportunity to be heard and to argue in his case. We do not feel that his Constitutional rights are hereby impaired in any way." [R. 87-88].

At the earliest opportunity, petitioner raised the objection that the opinion and order of the Commission violated his Constitutional rights. The opinion came down on October 6, 1964. In California, as a prerequisite to obtaining judicial review, a petition for rehearing must be filed with the Commission,[11] and, on November 17, 1964, he filed the petition with the Commission at Los Angeles. In that petition he raised every objection to the opinion and order which he now seeks to assert before this Court [R. 100-105, 109, 118-119, 120].

The Commission reaffirmed its position in an order denying rehearing, dated February 3, 1965, Decision

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[11] *Commercial Communications, Inc. v. Public Utilities Commission*, 50 Cal. 2d 512, 327 P. 2d 513, appeal dismissed 119, certiorari denied and appeal dismissed 359 U.S. 341.

No. 68536. Thereafter, the Supreme Court of California declined to review the opinion and order, without rendering an opinion in its own, on July 28, 1965 [R. 188]. The grounds upon which petitioner sought a rehearing in the Commission and review in the state supreme court were as follows: that the opinion and order of the Commission deprived petitioner of rights protected by the due process and equal protection clauses in the Fourteenth Amendment to the Constitution of the United States in that the order commanded petitioner to incriminate himself, in violation of his privilege records and abstracting from them a written, signed against self-incrimination, by evaluating past business records and abstracting from them a written, signed account of his infractions of the law; and in that petitioner was denied equal protection because he was found guilty of impairing the minimum rate structure for engaging in practices common to the contract carriage industry and endorsed by the Commission, such as specialization of services and use of subhaulers, and in that this operating permits were conditioned to prohibit him from hiring subhaulers in the future, where no rational justification was supplied for classifying petitioner differently from other contract carriers similarly situated.

Denial by the Supreme Court of the State of California of the petition for a writ of review was a decision on the merits both as to law and facts presented in review proceedings.[12] Petitioner challenged the order below as repugnant to provisions of the Constitu-

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[12] *People v. Western Airlines*, 42 Cal. 2d 621, 268 P. 2d 723 (1954), appeal dismissed, 348 U.S. 859.

tion of the United States which apply to the states and, in a final decision by the highest court of the state, the constitutionality of that order was sustained.

Petitioner then applied for a stay of execution to permit application to the Supreme Court of the United States for a writ of certiorari [R. 189-218], but his request for a stay was later dismissed pursuant to a stipulation between the parties [R. 223].

Petitioner took steps to obtain a certified record of the proceedings below, including a certified copy of the brief of the Commission staff before the Public Utilities Commission and a certified copy of the reporter's transcript of the hearing before the Public Utilities Commission, as is required by Rules 21(1) and 31(2) of the Rules of this Court. Those documents constitute part of the record in this case.[13] However, they are not a part of the record of the Supreme Court of the State of California. Petitioner was informed, informally, by the Clerk of the Supreme Court of California, that those portions of the record in the case were not and had never been part of the record of the Supreme Court of California. Those items had been and are now in the possession and custody of the Public Utilities Commission below, and they were not transmitted by the Public Utilities Commission to the Supreme Court of California when petitioner petitioned that court for a review, for the reason that Public Utilities Code Section 1756,[14] which provides the exclusive method of obtaining judicial review of the record below, provides that the Public Utili-

[13]Public Utilities Code Section 1706 (Calif. Stat. 1951, c. 764, p. 2080); Appendix A, *infra*, p. 1.

[14]See Appendix A, *infra*, p. 2.

ties Commission need not certify any portion of its record up to the California Supreme Court unless ordered to do so by that court (and never upon the mere request of a petitioner who is seeking review), and the California Supreme Court itself does not have the authority to order the Commission to certify up any part of its record unless the court grants the writ of review. The California Supreme Court's decision as to whether or not to grant review is based upon a reading of only the briefs of the parties and whatever portions of the record are voluntarily transmitted by the Commission, and if, as in the present case, the Court reads the brief and denies the writ of review, most of the record below never leaves the possession of the Commission. Petitioner submitted to the Clerk of the California Supreme Court a designated of record and request for certification of portions of the original record [R. 224-230], which included a request for those portions of the record which, as the Clerk had already informed attorneys for petitioner, were in the possession and custody of the Public Utilities Commission. The Clerk certified all those portions of the record in the possession of the Supreme Court of the state and sent back a letter explaining that certain items presented for certification were not now and had never been in the possession of that court. A copy of this letter is included herein, as Appendix E. Earlier, attorneys for petitioner had discussed the matter of bringing up the record with Mrs. Mary Moran Pajalich and Mr. James Blumberg of the legal division of the Public Utilities Commission of the State of California and they asserted that the Public Utilities Commission refuses to certify to the Su-

preme Court of the United States any portion of the record still in the possession of the Commission. Petitioner has therefore submitted to this Court, along with this petition and the portions of the record which were certified, a copy of the brief of the Commission Staff before the Public Utilities Commission and a copy of the Reporter's Transcript of the hearing before the Public Utilities Commission, neither of which was certified as required by the Rules of this Court.

Reasons for Granting the Writ.

1. Under the decisions of this Court, a state administrative agency may not compel the operator of a business entity subject to agency regulation to prepare and file a written report evaluating his past business records and abstracting therefrom admitted infractions of the law which are criminally punishable. Such a requirement is inconsistent with the Fifth Amendment's privilege against self-incrimination, made applicable to the states by the due process clause of the Fourteenth Amendment.

Malloy v. Hogan, 378 U.S. 1 (1964).

This case raises an important federal question with respect to due process in administrative procedure and contract carrier regulation and with respect to the scope and content of the privilege against self-incrimination, where that privilege is invoked in the framework of administrative adjudication (*Cohen v. Hurley,* 366 U.S. 117 (1961); *Frank v. Maryland,* 359 U.S. 360 (1959); but *cf.* dissenting opinion of Justice Black in *In re Groban,* 352 U.S. 330 (1957), recently cited with approval by the majority in *Escobedo v. Illinois,* 378 U.S. 478 (1964)).

The investigation which led to the hearing by the Commission was not terminated by the Commission's act of deciding the case. The proceedings were merely held in abeyance while petitioner was ordered to go out, examine all of his own transactions, itemize all undercharges, and report all the undercharges to the Commission *as undercharges* within a specified period of time. This proceeding is still open. Petitioner is still potentially liable for criminal punishment in the form of fines, penalties and possible jail sentences for undercharge violations, and if he now must go out and examine all his transactions for the purpose of listing all infractions of statutory authority and regulations, the effect of the order is to deny him his privilege against self-incrimination. The order directs him to file a written report with the Commission admitting undercharges.

Petitioner re-emphasizes here that the protection against compulsory self-incrimination, guaranteed by the Fifth Amendment and made applicable to the states by the Fourteenth Amendment, is nullified to whatever extent the Commission may require a citizen to keep an account of his misdeeds and turn over the record to the Commission inspectors, who then can use it to convict him. These are not records petitioner would customarily keep. The Commission has not merely asked petitioner for all his business records during the investigatory period, it has ordered him to make an evaluation from those records of the instances when he violated the law. The vice in that order is

similar to a defect condemned by the United States Supreme Court in *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1 (1961) as follows:

> ". . . The Party contends that these requirements cannot be imposed and exacted consistently with the self-incrimination clause of the Fifth Amendment. Officers of the Party, it is argued, are compelled, in the very act of filing a signed registration statement, to admit that they are Party officers—an admission which we have held incriminating . . . what is required is said to be not merely the production of documents kept in an official capacity for the Party . . . but individual action by the officers which, by establishing a connection between the officers and the documents, in effect convicts the officers out of their own mouths. . . ."

The itemization ordered is objectionable to the extent it would furnish evidence to convict petitioner of a misdemeanor in a future proceeding as part of this very same proceeding. If the Court finds this proceeding has not yet become "criminal," that fact wouldn't remove the objection, for, as recognized in *Malloy v. Hogan, supra*, 378 U.S. at pages 11-13:

> "It must be considered irrelevant that the petitioner was a witness in a statutory inquiry and not a defendant in a criminal prosecution. . . . We recently elaborated the content of the federal standard in Hoffman (*Hoffman v. United States*, 341 U.S. 479): 'The privilege afforded not only extends to answers that would in themselves sup-

> port a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute . . . if the witness, upon interposing his claim, were required to prove the hazard . . . he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because an injurious disclosure could result.' 341 U.S., at 486-487."

Petitioner submits that this part of the order, requiring the itemization, operates to violate his privilege against self-incrimination by requiring him to summarize for the Commission his own misdeeds.

2. Under the due process and equal protection clauses of the Fourteenth Amendment, as interpreted by this Court, a state administrative agency may not except from the operation of otherwise applicable minimum rate tariffs a large class of specialized contract carriers using subhaulers and permit them to employ subhaulers at subhauler rates, and yet apply the tariff to those contract carriers who solidify goodwill by rendering services of any kind for their shippers totally unrelated to transportation or the costs of transportation and without an ascertained money value and prohibit the latter from employing subhaulers at subhauler rates.

Morey v. Doud, 354 U.S. 457 (1957).

Judicial review of administrative decisions is more than a hopeless formality for the litigant. Its objection

—broadly speaking—is to serve as a check on the administrative branch of government—a check against excess of power and abusive exercise of power in derogation of private right. Besides curbing an agency when it acts beyond its delegated authority, judicial review can insist that factual determinations made on the basis of a record be supported by substantial evidence. It can provide relief against clearly arbitrary of unreasonable administrative acts. It can require agencies to observe minimum standards of fairness in their procedures, and to articulate their reasons and findings with care and precision.

> *Federal Communications Commission v. Pottsville Broadcasting Company,* 309 U.S. 134 (1940).

The requirements of due process and equal protection should impel this Court to require the Commission to observe minimum standards of fairness and to articulate precise findings based upon fact rather than speculation. The Commission should not be freed from the duty of making findings on all material issues based on substantial evidence. The substantial evidence rule requires the findings and opinion of a body to contain sufficient factual data to enable a reviewing court to determine whether conclusions are based on mere facts or speculation, and if upon facts, what facts. But the Commission has consistently refused to discuss the accuracy of the findings in terms of substantial evidence.

The substantial evidence rule is construed to confer finality upon an administrative decision on the facts when, upon an examination of the entire record, the evidence, including the inferences therefrom, is such

that a reasonable man, acting reasonably, might have reached the decision. On the other hand, if a reasonable man, acting reasonably, could not have reached the decision upon the evidence and the inferences therefrom, then the decision is not supported by substantial evidence, and it should be set aside. Substantial evidence is, ". . . more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (*Consolidated Edison Company v. National Labor Relations Board,* 305 U.S. 197, 229 (1938).) The requirement means the record must contain sufficient data to enable the Court to determine whether the Commission's conclusions are based upon facts or speculation, and if upon facts, what facts.

In the answer and in the opinion below, the Commission attempted to supply, for missing links in its chain of proof, mere speculation in the guise of official notice and administrative expertise. In so doing, it invited the court to confuse administrative specialization with administrative expertise. Granted, the Commission has specialized in regulating public utilities by prescribing and enforcing minimum rates. But sheer specialization of work does not inevitably make for expertness. Some specialization is nothing more than a convenience, as when minor adjudicatory functions are assigned to administrators rather than judges, lest the regular business of the courts be overborne by petty affairs—as would happen, for example, if federal judges instead of employees of the Bureau of Old Age and Survivors Insurance had to pass on the nearly two million pension claims that are adjudicated annually. The administrators who perform that work become specialists without

being able to claim any particular expertness. Similarly, administrators who make decisions concerning such abstractions as "obsenity," "security," and "loyalty," which bulk so large in the newer realms of administration, are not experts though they may sometimes be specialists. No well defined educational process or routinized training has equipped them, as distinct from judges and jurors, to determine the delicate issues of philosophy aesthetics, psychology, or political theory that arise in contemporary administration. The great bulk of decisions by the Public Utilities Commission involve either the ascertainment of past occurrences or the enunciation of informed judgments about future economic developments. The "facts" are found in the light of objective evidence about non-repetitive events. Now the Commission would substitute mere subjectivism for such evidence, but petitioner contends subjectivism should not suffice, and opinions and orders should have a "hard core of factual possibility," so their rationality may be objectively demonstrated. As stated in *Public Service Commission of Utah v. United States,* 356 U.S. 421 (1957), at page 428:

> ". . . The Commission's wishful thinking (cannot) be substituted for substantial evidence . . ."

The facts of this case do not require judicial deference to the expertise of the Commission. An examination of the record herein for substantial evidence would not involve a discretionary selection between highly controversial policy choices or an understanding of complex technical issues of fact (Cf., Jaffe, *Judicial Review: Question of Fact,* 69 Harv. L.R. 1020, 1055 (1956)). Rather, the issues here are the kind this Court is accustomed to encountering. It is a question of law

whether substantial factual data and testimony exists in the record to support the Commission's finding. (*National Auto Insurance Company v. Industrial Accident Commission,* 139 Cal. App. 414.) While the administrative experience of the Commission is inherently present here, administrative experience is always present in appeals involving the Commission and would always invite deference by this Court to an assertion of administrative power, wherever invoked in briefs and oral argument to sustain otherwise reprehensible results; administrative experience cannot be conclusive in matters of law nor be invoked to support action outside of the law.

Administrative expertise, a slogan which served well in a period of struggle to establish some degree of authority for emerging new agencies in the Roosevelt era, is heavily relied upon by respondent to justify the results of this case. But administrative agencies are no longer in the experimental stage. As illustrated by the example of the Public Utilities Commission, administrative decision making which has been routinized has moved from discretion to rule of law, where the general tribunals of our society, the judiciary, should be competent. Further judicial reflection suggests the time has come for a re-examination of the content of the slogan, "administrative expertise." (*Red Ball Motor Freight v. Shannon, supra,* 377 U.S. 311 (1964).) That slogan fails to supply the missing links in respondent's chain of proof. It cannot make plausible the Commission's finding of an undercharge violation based on an issue of fact to which neither party addressed its attention or prepared a case. Nor can it lend validity to an undercharge violation based on isolated mathe-

matical errors, if, during the total period under investigation, undercharges were actually offset by overcharges, for neither the competitors of petitioner nor the competitors of the shipper would be injured by such errors and the basic purpose of minimum rate regulations would not be frustrated. The unreliability of such random samplings as the basis for an order of the Interstate Commerce Commission was the subject of *Chicago, Milwaukee, St. Paul and Pacific Railroad Company v. Illinois,* 355 U.S. 300 (1958). where the Court explained, at pages 306-308:

> ". . . In substance the I.C.C. found that because this single segment of the Milwaukee Road's intrastate operations in Illinois did not meet out-of-pocket costs, there was an undue discrimination against the Road's intrastate operations without regard to the contribution of other Illinois intrastate revenues, freight or passenger, concerning which both the record and the findings are entirely silent . . .
>
> ". . . The basic objective (of the I.C. Act) . . . is to prevent a discrimination against the carrier's interstate traffic which would result from saddling that traffic with an undue burden of providing intrastate services. A fair picture of the intrastate operation . . . is not shown, in this case, by limiting consideration to the particular commuter service in disregard of the revenue contributed by the other intrastate services."

The Court then ordered the commission to make findings which,

> ". . . reflect the commuter service deficit in the totality of intrastate revenues . . ."

And the slogan of administrative expertise does not operate to cover up the Commission's failure to introduce evidence to distinguish petitioner's business operations from those of an ordinary contract carrier, or to prove its theory that the shipper pays petitioner's salary as a sales manager in the form of the difference between subhauler rates and prime carrier rates. Likewise, the doctrine of "official notice," which the Commission never mentioned in its opinion and was alluded to for the first time in the Answer, cannot explain away the Commission's failure to include evidence of the value of petitioner's sales services, or even assuming those services had a value, that the value was equal to the difference between the rates he charged the shipper and the rates paid to subhaulers. Similarly, the finding of an indirect refund must fall, for not only is there no evidence that the services had a value, much less a specific value, but there is no evidence the services were directly or indirectly related to the costs of transportation, that they resulted in a reduction of costs to the shipper of transportation rates, fares or charges. There is no proof, moreover, that the sales services operated to drop the costs of transportation below the minimum rate level, and Public Utilities Code Sections 3667 and 3668 prohibit only those refunds which operate to reduce the cost of transportation below the minimum rates. Viewed most favorably to the Commission the record shows that petitioner has been operating as a contract carrier, an independent sole proprietorship, tailored to the transportation needs of one shipper. The record also shows petitioner has been giving sales advice to the shipper, for which he has not received compensation. The record shows petitioner has employed subhaulers, which is a practice common to the transportation indus-

try and usually approved of by the Commission itself, which resulted in improved service to the shipper and reduced actual costs, with correspondingly higher margins of profit, to petitioner, though he always charged the shipper prime carrier minimum rates, to the best of his ability. The Commission has not pointed to any facts, data or testimony to supply the missing links in its case. The Commission has confused minimum rate evasion with the ordinary features of specialized common carriage, and petitoner implores this Court not to repeat the same error.

Petitioner has argued that the order attaching a condition to his operating permits which prohibits him from hiring subhaulers and paying them less than the rates applicable to prime carriers, amounts to a denial of equal protection of the laws, in that other contract carriers, similarly situated, have not been prohibited by the Commission from hiring subhaulers and the Commission has offered no rational justification for classifying petitioner differently.

The Commission has conceded it generally favors a policy of maximum utilization of backhaul capacity and authorizes prime carriers to contract out as subhaulers on the return haul; it sanctions the practice of prime carriers engaging the services and facilities of subhaulers to transport property at a rate which is less than the prescribed minimum rate applicable to prime carriers. (Ans. p. 6.) The Commission argued the classification was predicated upon a rational distinction—upon the fact that petitioner had "good samaritan" inclinations toward his one shipper (Ans. p. 15.) The Commission's authority, as conceived by it, includes the power to establish a classification between prime

carriers who never render or bestow any kind of favor upon their shippers, who never attempt to improve their good will or induce shippers to prefer them to other competing prime carriers, on the one hand, and those who try to obtain such a preference by rendering services for the shipper, totally unrelated to transportation or the costs of transportation, and which may have no monetary value or, at least, an unascertained monetary value. Those who render "free" services are classified "good samaritans." Earlier, petitioner has extensively attacked the alleged "rationality" of that classification. Petitioner has shown that factually the classification has no support in the evidence, that respondent has confused minimum rate evasion with the ordinary features of specialized common carriage. It has been shown, moreover, that the rendition of free sales services does not supply this rationality—merely because petitioner has given his only customer part-time sales advice without compensation, in order to incur goodwill, this does not convert his separate and distinct trucking business into something else. Goodwill should only be the concern of the Public Utilities Commission when it takes the form of a monetary or monetarily valuable concession which reduces the shipper's cost of transportation. Beyond the specious assertions already discussed, the Commission has offered no criteria for distinguishing a "good samaritan" from all other contract carriers employing subhaulers.

The equality guaranteed by the equal protection clause is equality under the same conditions, and among persons similarly situated. The Commission may make a reasonable classification of persons and businesses, but

the classification must not be arbitrary and it must be based upon some difference in the classes having a substantial relation to a legitimate object to be accomplished.

Kotch v. Board of River Port Pilot Commissioners, 330 U.S. 552 (1947).

Unequal treatment of those engaged in the same or substantially similar type of business is obviously suspect, and the Court will carefully examine the circumstances to determine whether any substantial difference exists between the classified businesses.

Morey v. Doud, 354 U.S. 457 (1957).

Petitioner contends that the "good samaritan" classification is unsupported by the evidence and devoid of rationality. The effect of the order conditioning petitioner's permits to prohibit the use of subhaulers is to treat petitioner differently from other persons who are also using subhaulers, and thereby to deny him equal protection of the laws as guaranteed by the United States Constitution.

3. Finally, petitioner submits that this Court should, in aid of its jurisdiction, issue a common law writ of certiorari either to the Supreme Court of the State of California or to the Public Utilities Commission of the State of California, whichever tribunal is the appropriate one, to compel that Court or that Commission to certify a transcript of the complete record herein to this Court. Under 28 U.S. Code Section 1651(a), this Court has the authority to compel the Court or the Commission below to certify a transcript.

In re Summers, 325 U.S. 561, 563 (1945).

The Commission has taken the position that it is not obliged to certify a portion of the record made before it in this matter which was not brought up to the Supreme Court of the State of California, and it therefore declines to certify that portion of the record which is still in its custody. Therefore, petitioner respectfully moves this Court to grant a common law writ of certiorari.

Respectfully submitted,

THOMAS S. TOBIN,
Attorney for Petitioner.

Proof of Service.

I, Thomas S. Tobin, one of the attorneys for James R. Green, doing business as Jim Green's Trucking Company, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certifies that on the 26th day of November, 1965, I served copies of the foregoing Petition for Certiorari and appended documents to the Supreme Court of the United States on the several parties thereto as follows: On the Public Utilities Commission of the State of California by mailing a copy, in a duly addressed envelope, with airmail postage prepaid, to Richard E. Tuttle and Mary Moran Pajalich, attorneys for the Public Utilities Commission of the State of California, 5072 State Building, San Francisco, California; William I. Sullivan, Office of the Clerk, Supreme Court of California, 4250 State Building, San Francisco, California.

THOMAS S. TOBIN

APPENDIX A.

Public Utilities Code Section 1705 (Calif. Stat. 1961, c. 1118, p. 2843, Section 1.):

> "At the time fixed for any hearing before the Commission or a Commissioner, or the time to which the hearing has been continued, the complainant and the corporation or person complained of, and such corporations or persons as the Commission allows to intervene, shall be entitled to be heard and to introduce evidence. The Commission shall issue process to enforce the attendance of all necessary witnesses. After the conclusion of the hearing, the Commission shall make and file its order, containing its decision. The decision shall contain, separately stated, findings of fact and conclusions of law by the Commission on all issues material to the order or decision. . . ."

Public Utilities Code Section 1706 (Calif. Stat. 1951, c. 764, p. 2080):

> "A complete record of all proceedings and testimony before the Commission or any Commissioner on any formal hearing shall be taken down by a reporter appointed by the Commission, and the parties shall be entitled to be heard in person or by attorney. In case of an action to review any order or decision of the Commission, a transcript of such testimony, together with all exhibits or copies thereof introduced, and of the pleadings, records, and proceedings in the cause, shall constitute the record of the Commission, but if the petitioner and the Commission stipulate that certain questions alone and a specified portion only of the evidence shall

be certified to the Supreme Court for its judgment, such stipulation and the questions and the evidence therein specified shall constitute the record on review."

Public Utilities Code Section 1756 (Calif. Stat. 1963, c. 461, p. 1310, Section 6.):

"Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on rehearing, the applicant may apply to the Supreme Court of this state for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable at a time and place then or thereafter specified by court order and shall direct the Commission to certify its record in the case to the court within the time therein specified."

Public Utilities Code Section 1757 (Calif. Stat. 1951, c. 764, p. 2990, Section 1757.):

"No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the Commission as certified to by it. The review shall not be extended further than to determine whether the Commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the state. The findings and conclusions of the Commission on questions of fact shall be final and shall

not be subject to review except as provided in this article. Such questions of fact shall include ultimate facts and the findings and conclusions of the Commission on reasonableness and discrimination."

Public Utilities Code Section 1759 (Calif. Stat. 1951, c. 764, p. 2091, Section 1759.):

"No court of this state, except the Supreme Court to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the Commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the Commission in the performance of its official duties, except that the writ of mandamus shall lie from the Supreme Court to the Commission in all proper cases."

Public Utilities Code Section 1760 (Calif. Stat. 1951, c. 764, p. 2091, Section 1760.):

"In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the Commission material to the determination of the Constitutional question shall not be final."

Public Utilities Code Section 1995 (Calif. Stat. 1951, c. 764, p. 2094, Section 1795.):

"No person shall be excluded from testiying or from producing any book, waybill, document, paper, or account in any investigation or inquiry by or hearing before the Commission or any Com-

missioner, when ordered to do so, upon the ground that the testimony or evidence. book, waybill, document, paper, or account required of him may tend to incriminate him or subject him to penalty or forfeiture, but no person shall be prosecuted, punished, or subjected to any penalty or forfeiture for or on account of any act, transaction, matter or thing concerning which, under oath, he has testified or produced documentary evidence, but no person so testifying shall be exempt from prosecution or punishment for any perjury committed by him in his testimony. Nothing herein contained shall be construed as in any matter giving to any public utility immunity of any kind."

Public Utilities Code Section 3664 (Calif. Stat. 1951, c. 746, p. 2118, Section 3664.):

"It is unlawful for any highway permit carrier to charge or collect any lesser rate than the minimum rate or greater rate than the maximum rate established by the Commission under this article."

Public Utilities Code Section 3666 (Calif. Stat. 1951, c. 764, p. 2118, Section 3666.):

"If any highway carrier other than a common carrier desires to pefrorm any transportation or accessorial service at a lesser rate than the minimum established rates, the Commission shall, upon finding that the proposed rate is reasonable, authorize the lesser rate."

Public Utilities Code Section 3667 (Calif. Stat. 1951, c. 764, p. 2119, Section 3667.):

"No highway permit carrier shall charge, demand or receive for the transportation of property, or

for any service in connection therewith, rates or charges less than the minimum rates and charges or greater than the maximum rates and charges applicable to such transportation established or approved by the Commission; nor shall any such carrier directly or indirectly pay any commission or refund, or remit in any manner or by any device any proportion of the rates or charges so specified, except upon authority of the Commission."

Public Utilities Code Section 3668 (Calif. Stat. 1951, c. 764, p. 2119, Section 3668.):

"No highway permit carrier, or any officer, or agent thereof, or any person acting or employed by it, shall, by means of known false billing, classification, weight, weighing or report of weight, or by any other device, assist, suffer, or permit any corporation or person to obtain transportation for any property between points within the state at rates less than the minimum rates or more than the maximum rates then established or approved by the Commission."

Public Utilities Code Section 3774 (Calif. Stat. 1961, c. 1444, p. 3291, Section 2.):

"The Commission may cancel, revoke, or suspend the operating permit or permits of any highway carrier upon any of the following grounds:

(a) Any illegally conducted highway carrier operations.

(b) The violation of any of the provisions of this Chapter, or of any operating permit issued thereunder.

(c) The violation of any order, decision, rule, regulation, direction, demand, or requirement established by the Commission pursuant to this chapter.

(d) The conviction of the highway carrier of any misdemeanor under this chapter.

(e) The rendition of a judgment against the highway carrier for any penalty imposed under this chapter.

(f) The failure of a highway carrier to pay any fee imposed upon the carrier within the time required by law.

"As an alternative to the cancellation, revocation, or suspension of an operating permit or permits, the Commission may impose upon the holder of such permit or permits a fine of not exceeding $5,000.00. All fines collected shall be deposited at least once each month in state treasury to the credit of the general fund."

Public Utilities Code Section 3800 (Calif. Stat. 1963, c. 1877, p. 3862, Section 3.):

"Whenever the Commission, after a hearing, finds that any highway permit carrier has charged, collected, or received for the transportation of property, of for any service in connection therewith, rates or charges less than the minimum rates and charges applicable to such transportation established or approved by the Commission, or has directly or indirectly refunded or remitted in any manner or by any device any portion of such minimum rates or charges, or has paid a commission, without an order of the Commission so authorizing, the

Commission shall require such carrier to collect the undercharges involved and may imposed upon the carrier a fine equal to the amount of such undercharges. All such fines shall be paid into the state treasury to the credit of the general fund. The remedy and penalty provided by this Section are cumulative and shall not be a bar to or affect any other remedy of penalty provided for in this chapter, or to the exercise by the Commission of its power to punish for contempt."

APPENDIX B.

Opinion.

Before the Public Utilities Commission of the State of California. Decision No. 67998.

Investigation on the Commission's own motion into the operations, rates, charges, and practices of James R. Green, doing business as Jim Green's Trucking Company. Case No. 7763.

Musick, Peeler & Garrett, by *Albert Mosher,* for respondent.

Lawrence Q. Garcia and *Charles P. Barrett, for* the Commission staff.

By its order dated October 29, 1963, the Commission instituted an investigation into the operations, rates, charges and practices of James R. Green, doing business as Jim Green's Trucking Company.

A public hearing was held before Examiner Gravelle on January 15, 1964 at Los Angeles. The matter was submitted subject to the filing of briefs, the last of which was filed on July 20, 1964.

Respondent presently conducts operations pursuant to Radial Highway Common Carrier Permit No. 19-53520, Highway Contract Carrier Permit No. 19-53521 and City Carrier Permit No. 19-53522, all dated October 14, 1960. Respondent maintains no terminal facilities. He owns one piece of equipment but does not operate it. He employs one person. His total gross revenue for the year ending September 30, 1963 was $261,-942. Copies of the appropriate tariff and the distance table were served upon respondent.

In March and June of 1962, a representative of the Commission's Field Section visited respondent's offices and checked his records for the period from October 1961 through April 1962, inclusive. The underlying documents relating to thirteen shipments were taken from repondent's files, photocopied and the copies submitted to the License and Compliance Branch of the Commission's Transportation Division. They were introduced in evidence as Exhibit No. 2. Based upon the data taken from said shipping documents a rate study was prepared and introduce in evience as Exhibit No. 3. Said exhibit reflects undercharges in the amount of $530.46.

The undercharges involved in this proceeding are not the major contention of the Commission staff. It is the staff position, in part, that this proceeding is a direct outgrowth of a prior Commission action. Case No. 6320, which in Decision No. 61963 dated May 9, 1961, was an investigation into the operations, rates and practices of Nell V. Lewis and LaVerne Villerme, doing business as Certified Transport, and of D. B. Lewis, Lewis Food Company, and the Organization to Repeal Federal Income Taxes (ORFIT). Decision No. 61963 was appealed to the Supreme Court of the State of California by means of a Petition for Writ of Review. Said petition was denied by the Court on October 4, 1961. The Commission hereby takes official notice of that decision and the action of the Court. In general, Decision No. 61963 found that the carrier involved in that proceeding was a device by which the shipper obtained transportation at rates less than the minimum prescribed by the Commission. The staff in the instant proceeding contends, among other

things, that respondent is continuing the practice proscribed by the prior decision and is thereby evading the effect of the order in Decision No. 61963. Counsel for respondent argues that no party to the previous investigation or decision is a party herein, nor was respondent a party to the prior proceedings. In this argument he is quite obviously correct. The only person who might reasonably be directly connected with both proceedings is Nell V. Lewis Green who is the spouse of respondent and was a party to Case No. 6320. While she may have a community interest in the business of respondent, she is not legally a party to this investigation.

While it is true that there is insufficient evidence to sustain a finding that respondent is evading the order of the Commission in Decision No. 61963, that is not to say that the evidence adduced herein will not support a finding that he, too, is providing transportation to a shipper at rates less than the minimum through the use of a device. The Commission would be more than lax in its duties if it were to close its eyes to the similarities common to the two cases. Respondent testified that he had been an employee of Lewis Food Company, the shipper involved in both proceedings, "Prior to November 1960". He obtained his permits from this Commission in October of 1960. From November of 1960 to October 10, 1961, he voluntarily suspended his permits for the stated reason that he was gainfully employed elsewhere. That employment, by his own testimony. was for the carrier which was a respondent in Case No. 6320. The work he performed for said carrier was rating and billing. It should be noted that respondent secured his permits between the

time of hearing in Case No. 6320 and the time a decision was rendered in that proceeding. Six days after the Supreme Court denied the Writ of Review in Case No. 6320, respondent herein activated his permits. The present operation finds respondent holding the permits, and his wife (a respondent in Case No. 6320) performing the rating and billing. Respondent's shipping documents as reflected by Exhibit No. 2 are the same as used by Certified Transport with the permit numbers of Certified crossed out and respondent's inserted in their place and the name Certified Transport replaced by Jim Green's Trucking. The offices are the same in each case; the shipper is the same in each case; the methods of operation are the same in each case, including not only the exclusive use of subhaulers but also the use of Northern California carriers seeking back-hauls. Mrs. Green (Nell V. Lewis) admitted to the staff investigator that the operations of Jim Green's Trucking were the same as Certified Transport.

The major distinction between the two cases is that in the prior proceeding the Commission found an "alter ego" device. There is no such "alter ego" situation in the instant case, but that, of course, does not preclude the finding of a device other than an "alter ego" type if the evidence so indicates.

The staff presented testimony of two disinterested persons who had business dealings with Lewis Food Company. They each identified respondent as the sales manager of Lewis Food Company during 1962 and 1963. Staff counsel presented Lewis Food Company documents dated in 1962 authorizing sales instructions to jobbers and brokers and bearing the name "James Green Sales Department" (Exhibit No. 1). The author

of those instructions was respondent. The evidence shows that respondent maintains an office or at least "desk space" elsewhere in the Lewis Food Company building. He was identified as the sales manager by a Lewis Food Company receptionist and he answered a telephone call directed to the Lewis Food Company sales manager. The evidence further shows that respondent had represented Lewis Food Company in a formal proceeding before this Commission on August 30, 1961 in Case No. 5330, Order Setting Hearing of May 16, 1961. A review of respondent's testimony as recorded in the official transcript of said case leaves little doubt as to his representation on behalf of the shipper. The position stated therein appears odd for one about to activate his permits and engage actively in the transportation business. Respondent has an expense account with Lewis Food Company which he submits on a regular monthly basis. The explanation given by respondent for *all* the evidence of employment mentioned above is that he acts as a "consultant" on a friendly basis to D. B. Lewis and Lewis Food Company in an effort to increase their business and, consequently, his own transportation business. The contention of the Commission staff is that Lewis Food Company is paying its sales manager by means of his purported operation of a for-hire trucking business in which only subhaulers are used and at rates differing from and less than the minimum, said difference being his sales manager remuneration. The staff points out that this device lowers the shipper's operating costs even though the shipper may pay the purported carrier the full minimum rate and that such a device undermines the minimum rate structure and allows discrimination in favor of such shipper.

We find, as the staff contends, that respondent's services for the shipper constitute an indirect refund to Lewis Food Company and a device whereby Lewis Food Company obtains transportation at rates less than the minimum.

The staff also contends that respondent is acting as a motor transportation broker and that the subhaulers who perform the actual transportation are in reality prime carriers. The fact that respondent holds operating authority as a "carrier" does not in and of itself make respondent one transporting property for compensation. Neither does the fact that respondent holds no license as a motor transportation broker preclude his actions and services from being those of such a broker. Staff counsel cites *United States v Drumm,* 368 U.S. 370, 7 L. ed. 2d 360, to show what the Supreme Court of the United States has determined to be some of the characteristic burdens of the transportation business. They are:

1. The large capital investment in equipment and risk of premature depreciation and catastrophic loss.

2. The risk of a rise in variable costs such as fuels, repairs, and maintenance.

3. The risk of nonutilization of high-priced equipment.

From the evidence it is clear that respondent has assumed none of these characteristics, hence, it may be said that respondent's operation in *reality* is more akin to that of a broker than that of a carrier. It must be noted at this point that respondent while acting as a broker is performing even that function in violation of Public Utilities Code Section 4835 which prohibits a broker from having any affiliation with a shipper.

The use of subhaulers has not been precluded by this Commission nor have the rates they collect under Minimum Rate Tariff No. 2 been fixed. The Commission has, however, seen fit, when circumstances dictated, to restrict the permits it has issued so that certain carriers are required to pay subhaulers they employ for the account of particular shippers the full minimum rate. The Commission has also on many occasions ordered its permittees to pay to subhaulers who have actually performed the function of prime carriage the full minimum rate. We find that the evidence adduced in this proceeding warrants the imposition of such a restriction on respondent's permits and, further, that such evidence warrants an order that respondent pay to the subhaulers he has engaged, and who have in reality been the prime carriers, the full minimum rates.

Respondent's basic argument has been on his view of the evidence. Suffice it to say that the Commission does not view the evidence in the same light as does respondent. Stemming from respondent's view of the evidence is the conclusion that for the Commission to impose any sanction upon respondent would exceed the jurisdiction of the Commission and violate respondent's rights to due process and the equal protection of the law. We find the evidence in this proceeding to show clearly that respondent is engaged, through the use of a device and the use of purported subhaulers, in an activity that impairs the minimum rate structure and violates the Public Utilities Code. Respondent has been well represented by counsel and has had the opportunity to be heard and to argue his case. We do not feel that his constitutional rights are hereby impaired in any way.

After consideration the Commission finds that:

1. Respondent operates pursuant to Radial Highway Common Carrier Permit No. 19-53520, Highway Contract Carrier Permit No. 19-53521 and City Carrier Permit No. 19-53522.

2. Respondent was served with the appropriate tariff and the distance table.

3. Respondent charged less than the lawfully prescribed minimum rate in the instances as set forth in Exhibit No. 3, resulting in undercharges in the amount of $530.46.

4. Respondent performs services for Lewis Food Company in its sales department for which he receives payment in the form of the difference between the minimum rates and the rates paid to the purported subhaulers who are in fact prime carriers, this activity constituting a device whereby respondent through the use of his permits is allowing Lewis Food Company to obtain transportation at less than the minimum rates in Minimum Rate Tariff No. 2.

Based upon the foregoing findings of fact, the Commission concludes that respondent violated Sections 3667 and 3668 of the Public Utilities Code and should pay a fine in the amount of $1,000.

The order which follows will direct respondent to review his records to ascertain all undercharges that have occurred since April 1, 1962 in addition to those set forth herein. The Commission expects that when undercharges have been ascertained, respondent will proceed promptly, diligently and in good faith to pursue all reasonable measures to collect them. The staff of the Commission will make a subsequent field investiga-

tion into the measures taken by respondent and the results thereof. If there is reason to believe that respondent, or his attorney, has not been diligent, or has not taken all reasonable measures to collect all undercharges, or has not acted in good faith, the Commission will reopen this proceeding for the purpose of formally inquiring into the circumstances and for the purpose of determining whether further sanctions should be imposed.

ORDER

It Is Ordered that:

1. Respondent shall pay a fine of $1,000 to this Commission on or before the twentieth day after the effective date of this order.

2. Respondent shall examine his records for the period from April 1, 1962 to the present time, for the purpose of ascertaining all undercharges that have occurred.

3. Within ninety days after the effective date of this order, respondent shall complete the examination of his records required by paragraph 2 of this order and shall file with the Commission a report setting forth all undercharges found pursuant to that examination.

4. Respondent shall take such action, including legal action, as may be necessary to collect the amounts of undercharges set forth herein, together with those found after the examination required by paragraph 2 of this order, and shall notify the Commission in writing upon the consummation of such collections.

5. In the event undercharges ordered to be collected by paragraph 4 of this order, or any part of such un-

dercharges, remain uncollected one hundred twenty days after the effective date of this order, respondent shall institute legal proceedings to effect collection and shall file with the Commission, on the first Monday of each month thereafter, a report of the undercharges remaining to be collected and specifying the action taken to collect such undercharges and the result of such action, until such undercharges have been collected in full or until further order of the Commission.

6. Respondent shall review his records for all transportation performed for Lewis Food Company wherein purported subhaulers were used to perform the actual transportation during the period from October 1, 1961 to the effective date of this order. Respondent shall pay to such purported subhaulers the difference between the lawful minimum rate and charge applicable to such transportation and the amount previously paid to such furnishers of transportation ostensibly as subhaulers. Said payment shall be completed no later than one hundred and twenty days after the effective date of this order.

7. The Secretary of the Commission is directed to cause to be amended, on the effective date of this order, Radial Highway Common Carrier Permit No. 19-53520, Highway Contract Carrier Permit No. 19-53521, and City Carrier Permit No. 19-53522 issued to James R. Green by prohibiting James R. Green whenever he engaged other carriers in connection with the transportation of property for Lewis Food Company or its customers or suppliers, from paying such other carriers less than the applicable minimum rates established by the Commission.

The Secretary of the Commission is directed to cause personal service of this order to be made upon respondent. The effective date of this order shall be twenty days after the completion of such service.

Dated at San Francisco, California, this 6th day of October, 1964.

Frederick B. Holoboff
President
George G. Grover
William M. Bennett
Commissioners

Commissioner Everett C. McKeage, being necessarily absent, did not participate in the disposition of this proceeding.

APPENDIX C.

Brief of the Commission Staff.

Before the Public Utilities Commission of the State of California.

Investigation on the Commission's own Motion into the operations, rates, charges, and practices of James R. Green, doing business as Jim Green's Trucking Company. Case No. 7763.

PRELIMINARY STATEMENT

Case No. 6320 was an investigation by the Commission into the operations, rates, and practices of Nell V. Lewis and La Verna Villerme, doing business as Certified Transport, and of D. B. Lewis, Lewis Food Company, and the Organization to Repeal Federal Income Taxes (ORFIT). Decision 61963 in that case found among other things "D. B. Lewis is the alter ego of the Lewis Food Company, the Organization To Repeal Federal Income Taxes, and Certified Transport, and that they are a means and device by which D. B. Lewis obtains and has obtained transportation of property within the State of California at less-than-minimum rates prescribed by this Commission." (D. 61963, p. 7). As a result thereof, the operating permits of Certified Transport were cancelled and revoked, and D. B. Lewis, Lewis Food Company, Nell V. Lewis, the Organization to Repeal Federal Income Taxes, Inc., doing business as Certified Transport, were ordered to cease and desist from operating as a contract, city, or radial permit carrier.

The instant proceedings, Case 7763, were instituted to determine, among other things, whether respondent James R. Green dba Jim Green's Trucking is an instru-

mentality or device by means of which D. B. Lewis, Nell V. Green, or Lewis Food Company were evading the order in Decision 61963.

ISSUES

The issues herein are as follows:

1. Whether the operations of Jim Green's Trucking are substantially a continuance of the operations of Certified Transport.

2. Whether respondent Jim Green's Trucking has directly or indirectly refunded or remitted by any manner or any device any portion of the minimum rates and charges.

3. Whether respondent Jim Green Trucking has permitted corporations or persons to obtain transportation of property at less than the applicable rates and charges described in MRT No. 2.

4. Whether the respondent, Jim Green's Trucking, is in fact operating as a motor transportation broker and underlying carriers or subhaulers are in fact performing transportation as prime carriers.

I.

THE ACTIVITIES OF JIM GREEN'S TRUCKING ARE IN SUBSTANCE A CONTINUATION OF THE PRACTICES OF CERTIFIED TRANSPORT

An analysis of the events leading up to the formation of Jim Green's Trucking and of the operating practices of both Certified and Jim Green's Trucking, can

only lead an objective observer to conclude that there is no substantial difference between the business activities of Certified and that of Jim Green's Trucking.

Let us first examine the manner in which Jim Green's Trucking came into existence. Hearings in the Certified Transport matter were held in 1959, and the Decision issued on May 9, 1961. Nell V. Green, wife of respondent, was one of the two partners in Certified Transport, and respondent himself performed rating and billing services. (Tr. 71, 86).

Certified Transport possessed contract, city, and radial carrier permits. In the *interval between hearing and decision,* Jim Green obtained contract, city, and radial carrier permits. (Tr. 27). Jim Green placed these permits into voluntary suspension, stating as a reason that he was gainfully employed elsewhere. (Tr. 37, 38).

A petition for writ to review D. 61963 was filed with the Supreme Court of the State of California. That petition was denied on October 4, 1961. (Tr. 41). *Six days later,* on October 10, 1961, Jim Green activated his permits. (Tr. 41).

Thus, the record discloses that a person actively engaged in the operations of Certified, obtained the same type of permits as those of Certified during a period when Certified's operating authority was in jeopardy, and activated those permits when the order of revocation was made final by the Supreme Court.

Secondly, let us compare the operations of Certified and Jim Green. Certified had an office on the Lewis

Food Company premises, one off the premises, and transported for Lewis Food. Jim Green's Trucking has an office at the Lewis Food Company premises, one off the premises (Tr. 64, 65), and transports exclusively for Lewis Food. (Tr. 24). Certified Transport did not transport property on its own equipment, rather it used subhaulers exclusively. Jim Green's Trucking also uses subhaulers exclusively. (Tr. 25, 87-88).

The subhaulers engaged by Certified were Northern California carriers who sought back-haul shipments. The subhaulers engaged by Jim Green's Trucking are Northern California carriers seeking back-haul shipments. (Tr. 88).

Jim and Nell V. Green were connected with Certified Transport, Mrs. Green as a permit holder, and Jim Green as the person doing the rating and billing. (Tr. 86). Jim and Nell V. Green are connected with Jim Green's Trucking. Mrs. Green as the person doing the rating and billing (Tr. 32), and Jim Green as the permit holder. Mrs. Green admitted that the operations of Jim Green's Trucking were the same as Certified's. (Tr. 30-31).

The web of fact and circumstance tightens and leads to the inescapable conclusion that today Jim Green's Trucking carries on where Certified left off.

When the operating authority of Certified was revoked, that carrier technically died. Jim Green's Trucking is the reincarnation of certified. To say that Jim Green's Trucking is a different operation from that of Certified's because it is being conducted under different permits would be analogous to saying that a tractor becomes a trailer by merely changing its license plate.

II.

RESPONDENT HAS CONFERRED A SUBSTANTIAL ECONOMIC BENEFIT UPON ITS SHIPPER, LEWIS FOOD COMPANY, WHICH HAS RESULTED IN AN UNDERMINING OF THE MINIMUM RATE STRUCTURE, AND AN ILLEGAL REFUND OR REBATE.

In Decision 61963, it was found that the shipper obtained transportation at rates less than minimum through the device of Certified Transport. The retention of the difference between the minimum rate and the lesser amount paid to the subhauler inured to the benefit of the shipper who was found to be the alter ego of Certified.

Herein there may be no alter ego situation, but the net effect is the same as in the Certified matter. The difference between the minimum rate and the amount paid to subhaulers is retained by Jim Green, who acts as sales manager, at no salary, for Lewis Food Company. Lewis Food Company is paying its sales manager through the trucking company.

The evidence that Jim Green is sales manager for Lewis Food Company not only preponderates—it overwhelms. Jim Green is known as the sales manager for Lewis Food Company by persons not connected with that company (Tr. 14). He maintains an office, separate and apart from the trucking office, in the administrative area of the Lewis Food Company premises. (Tr. 26, 120, 121). When one asks for Jim Green at the Lewis Food Company premises, he is identified as the sales manager (Tr. 26, 27). If one telephones the Lewis Food Company and asks for the

sales manager, one is connected with Jim Green (Tr. 20).

Jim Green makes regular trips for Lewis Food Company every two or three months which may take up to two days (Tr. 108). He maintains an expense account which he has submitted on a monthly basis for at least 12 months, and prior to that he had also submitted expense accounts (Tr. p. 107). His expenses include entertaining prospective customers of Lewis Food Company; board, lodging, and travel (Tr. p. 116). Jim Green admits to spending 20 hours a week on behalf of the Lewis Food Company. (Tr. 106). He admits to consulting with Lewis Food Company on sales matters and states that he is training a sales manager. He admits that Lewis Food Company has an assistant sales manager (Tr. 106), but except for the president of the Company, D. B. Lewis, he could not identify any one as sales manager of the Company.

Jim Green issues sales bulletins to salesmen and brokers handling Lewis Food Company products (Tr. 105, Exhibit No. 1). His name appears at the bottom of said bulletins. An examination of these bulletins (Exhibit No. 1) indicates that they were issued not by Jim Green "consultant" but by Jim Green, an executive with authority to direct that certain action be taken by salesmen and brokers, in language that expects compliance. As an example, the bulletin dated June 11, 1962, is an *authorization* to continue offering "Skippy" 26-oz. at 40¢ per case. The bulletin dated November 13, 1962, directs brokers and salesmen to transmit information to jobbers and to take action so that shelf space is not lost by the Lewis Food Company. These are not the actions of a mere consultant.

By Mr. Green's own admission, he rendered these substantial services in order to increase his transportation business (Tr. 104-105). These services constitute an economic benefit to the shipper, Lewis Food Company, and reduced a certain portion of the operating costs of the shipper's business. In this respect they undermine the minimum rates established by the Commission because the carrier is granting a concession to the shipper that has a direct relation to transportation. The concession is illegal as long as it results in lowering *indirectly* transportation costs to the shipper. *Union Pacific Railroad Company vs. U. S.*, 313 U.S. 450, 464, 85 L. Ed. 1453, 1465. That case involved an interpretation of a Federal Statute, The Elkins Act, the prototype of Sections 3667 and 3668. This Commission has held that the dominant purpose of both the Federal and the California statutes is to protect the integrity of transportation and to prevent discrimination. *Cascade Refrierated Lines* (D. 66482).

The privilege and concession herein involved, while being directly related to transportation, is not provided for in the applicable tariffs. Privileges cannot be furnished a shipper unless they are provided for in a tariff. *Union Pacific Railroad Co. vs. U. S.* 362 U.S. 327, 6 L. Ed. 2d 766.

It is respectfully submitted that Jim Green's services as salesmanager constitute an indirect refund to Lewis Food Co., and a device whereby Lewis Food Co. obtains transportation at rates less than minimum.

It should be noted that Jim Green's Trucking hauls only 10% of Lewis Food Co. traffic, because some of this traffic is interstate in nature or transported as proprietory hauls. Yet nothing in the record indicates

that Jim Green's sales services are restricted to 10% of the sales. It can be thus seen that Jim Green is conferring a benefit to Lewis Food Co. out of proportion to what he might expect to receive in return as a trucker. This is a further indication that Jim Green's primary function and duty is that of salesmanager, not that of a for-hire carrier.

III.

RESPONDENT'S OPERATIONS ARE THOSE OF A MOTOR TRANSPORTATION BROKER AND NOT THOSE OF A FOR-HIRE CARRIER

The respondent is not a carrier. The services that it performs are in reality those of a motor transportation broker. The Motor Transportation Brokers' Act (Section 4801 et seq., Public Utilities Code) defines a motor carrier as one "transporting or offering or proposing to transport property for compensation." (Section 4804.) "To transport" has been defined as to carry or convey from one place to another. *Peo. v. One 1941 Cadillac Sedan,* 63 CA 2d 418.

"Transportation" has been judicially defined as implying the taking up of persons or property at some point and putting them down at another." *Golden Gate Scenic Lines v. Pub. Util. Comm.,* 57 C 2d 373.

Inasmuch as the respondent does not use its own equipment at all, it at no time has carried or conveyed from one place to another, or taken up persons or property at some point or put them down at another. Nor does respondent offer "to transport", it merely offers to provide transportation. Its activities are those of an intermediary between the shipping public and motor carriers of property. (Section 4801.)

Section 4805 exempts from the operation of the Act, officers, agents, or employees of any *carrier* who is under the jurisdiction of the Commission, but that exemption applies to "carriers". The respondent is not such a carrier.

In *United States v. Drumm,* 368 U.S. 370, 7 L. ed. 2d 360, it was determined that in order to be a carrier it was necessary to assume certain characteristic burdens of the transportation business. Some of these burdens were:

1. The large capital investment in equipment and risk of premature depreciation and catastrophic loss.

2. The risk of a rise in variable costs such as fuels, repairs, and maintenance.

3. The risk of non-utilization of high-priced equipment.

The respondent has not assumed any of these burdens, and its operations do not fit any of the judicial tests of a carrier. It has acted as a Motor Transportation Broker without possessing a permit therefor.

CONCLUSION AND RECOMMENDATION

The evidence suffices to demonstrate that Jim Green's Trucking is an instrumentality whereby the practices of Certified Transport have been perpetuated and Lewis Food Company has been enabled to obtain transportation at rates less than minimum. To reach any other conclusion would require a grotesque torturing of the facts. They paint a picture so clear that it cannot be clouded, and tell a story so obvious that impartial reasonable men could not disbelieve it.

However, in all fairness, the Staff must represent that the facts are not sufficient to demonstrate that D. B. Lewis, Lewis Food Company and ORFIT are operating as permit carriers in definance of the cease and desist order contained in D-61963. Nell V. Green's activities are such, however, that the Commission could conclude in light of all the facts that she is continuing to operate as a permit carrier in definance of the order. If the Commission so finds, she should be ordered to cease and desist.

The Permits of Respondent James Green must be revoked. The only other alternative would be to condition respondent's operating authority so that if he should engage subhaulers to transport shipments tendered by Lewis Food Company or by D. B. Lewis, or by their customers and suppliers, Respondent would be required to pay said subhaulers not less than the minimum rate. If the Commission should elect the latter course, the Staff recommends a 20-day suspension or, in the alternative, a $5,000.00 fine.

Undercharges herein were *de minimis*. There should not be an order to collect undercharges so as to prevent Respondent from being unjustly enriched.

Respectfully submitted,

/s/ Lawrence Q. Garcia
Lawrence Q. Garcia
Associate Counsel

LQG/ge

APPENDIX D.

Reporter's Transcript.

Before the Public Utilities Commission of the State of California, Richard D. Gravelle, Examiner, presiding.

Investigation on the Commission's own motion into the operations, rates, charges and practices of James R. Green, doing business as Jim Green's Trucking Company. Case No. 7763.

Los Angeles, California
January 15, 1964

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Volume 1

Reported by: J. C. Bevell

L. B. Nicewonger, C.S.R., Official Reporter
Public Utilities Commission, State of California
State Building, Civic Center, San Francisco, Calif.

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Before the Public Utilities Commission of the State of California, Richard D. Gravelle, Examiner, presiding.

* * * * *

Investigation on the Commission's own motion into the operations, rates, charges and practices of James R. Green, doing business as Jim Green's Trucking Company. Case No. 7763.

APPEARANCES

Musick, Peeler & Garrett, by Albert Mosher, 621 South Hope Street, Los Angeles, California, 90017, appearing for Respondent.

Lawrence Q. Garcia, Legal Counsel, State Building, San Francisco, and

Charles P. Barrett, Transportation Representative, State Office Building, Los Angeles, California, appearing for Commission staff.

* * * * *

Los Angeles, California, January 15, 1964, 10:00 a.m.

* * * * *

Examiner Gravelle: This Commission hearing will be in order.

This is the time and place set for a hearing on the investigation on the Commission's own motion into the operations, rates, charges and practices of James R. Green, doing business as Jim Green's Trucking Company, titled Case No. 7763.

I have the appearance of Musick, Peeler & Garrett by Albert Mosher, appearing for the respondent, James R. Green.

I also have the appearance of Lawrence Q. Garcia and Charles P. Barrett appearing on behalf of the Commission's staff.

Mr. Garcia, do you have an opening statement?

Mr. Garcia: Yes, Mr. Examiner.

The gist of our opening statement is, of course, stated In the Order Instituting Investigation.

However, very briefly, what concerns the staff here this morning is that by Decision 61963 this Commission issued a cease and desist order directed against a carrier known as Certified Transport.

The staff will show that the respondent, James Green, has assumed the operations of that carrier and is operating in the same manner.

We will show that at the time of the field investigation by our representative, Mr. Green used subhaulers exclusively in his operations.

We will show that the shipper involved in the Certified Transport matter is the shipper involved herein.

We will show that key personnel of Certified Transport are key personnel of respondent, Jim Green Trucking.

We will show that James Green provides personal services for the shipper for which he receives no remuneration.

By way of rate evidence, Mr. Examiner, we will introduce in the proceedings, and I believe Mr. Mosher has a copy of our rate statement, certain evidence relating to the rating practices of the respondent, that herein is mostly informational except for demonstrating one or two minor undercharges. What that ex-

hibit will do is simply to show what Jim Green assessed for shipments and what he paid the subhaulers by way of difference.

That is all I have by way of opening statement, Mr. Examiner.

Examiner Gravelle: Mr. Mosher, do you want to reserve the right to make a statement, or do you want to make a statement now?

Mr. Mosher: I reserve the right, Your Honor.

Examiner Gravelle: All right.

Proceed with your examination.

Mr. Garcia: I have subpoenaed—

Mr. Mosher: Mr. Garcia, excuse me.

May I interrupt to refer to the stipulation I briefly touched upon?

Examiner Gravelle: Certainly.

Mr. Mosher: Your Honor, I would like to offer this stipulation—I will stipulate to it and ask counsel if he would, too:

The respondent throughout the proceedings would like —does reserve all the rights under the Federal Constitution, the Constitution of the State of California, and the applicable state laws, the Public Utility Act, and also that we would like to stipulate, and we offer to stipulate that all questions, all testimony and evidence offered or adduced by the Commission will be deemed objected to by the respondent on the ground that it is incompetent, irrelevant and immaterial, that it is not within the issues, whatever hey may be, in this proceeding, and any other ground or grounds that may render the evidence inadmissible in this proceeding.

And referring to the first part of the stipulation, I would like emphasize that we reserve all rights, privileges on behalf of the respondent with respect to any defenses that might be applicable, such as statute of limitations as applying to any penalties that might be found or assessed.

And I request that the Commission and the state stipulate as I have indicated.

Mr. Garcia: I have no objection to the reservation of constitutional rights, defenses or, constitutional both state and federal, defenses by way of limitation whatever under the code; but I am somewhat puzzled by way of the stipulation of a blanket objection.

Are you reserving the right to argue that the evidence adduced was incompetent, irrelevant, or do you propose to object to it as it is offered, as it either comes in or not? That is my only concern there.

Mr. Mosher: Well, it was my thought that, however it might properly be expressed, that we would save time; I wouldn't sit here and make running objections to every question, but I thought it would simplify things and save time for everyone if it could be understood that the matter was introduced over—

Mr. Garcia: I see.

Mr. Mosher: —proper objections without my—

Mr. Garcia: I see.

Mr. Mosher: —so designating it or specifying it or orally stating the objections.

Mr. Garcia: Well, on that basis, I would have no objection to the stipulation, save, of course, the convenience of the Examiner who might—you might request argument on a point or two, if it is acceptable to you, Mr. Examiner.

Examiner Gravelle: It is certainly up to you gentlemen.

Mr. Garcia: On that basis I will accept the stipulation.

Mr. Mosher: I will be happy at any time, of course, if the Examiner cares to have any argument or discussion from me as to any particular point.

Examiner Gravelle: I think that is going to be within the realm of your discretion, Mr. Mosher. If testimony is going to be produced that you don't want to appear in this record, I think, despite the stipulation you are going to enter into, I think it might be wise of you to make an objection at that time; however, this is strictly discretionary on your part.

The stipulation will be received if you enter into it.

Mr. Mosher: Your Honor, you are pointing out to me, I take it, just reserving objections of this kind may not actually give the respondent any protection?

Examiner Gravelle: I can't answer that question for you.

Mr. Mosher: I know that some of the state courts take that view. They want a specific objection and a specific ruling.

Examiner Gravelle: We are going to have, the way I look at it—

Mr. Mosher: The way I thought, this was an informal proceeding, it appears to be under the rules, at least, it is relaxed from court procedure and probably would be sufficient; and I understand that we do have the right to either propose in writing, to request that the court give its proposed decision in advance. I hope to avoid that; but I would like to, not knowing what is

coming or what this proceeding is about, to be in a position to apply for and receive full and proper consideration on an application for rehearing, if that should be deemed advisable, and also to apply to the State Supreme Court and perhaps ultimately the U.S. Supreme Court for review, if that seems indicated, without waiving anything here. That is my point.

Examiner Gravelle: Certainly those things are within your rights, within the rights of the respondent. They are provided for in the rules and in the codes; and you are protected to that extent.

All I am saying is that if you have, if the testimony is being adduced that you don't want to appear in this record for any reason, it might be worth your while to make your objection at that time.

I am not trying to tell you in the least bit how to handle your case.

Mr. Mosher: I understand that, Your Honor.

Examiner Gravelle: And I will certainly receive the stipulation if it is entered into. It is fine with the Bench here.

Mr. Mosher: Well, I would like to have the stipulation. But I also would like to take another bite at, in those instances to which Your Honor alluded, of bringing things specifically to your attention for ruling.

Mr. Garcia: Fine.

Examiner Gravelle: Is that agreeable?

Mr. Garcia: Agreeable.

Examiner Gravelle: The stipulation is accepted as modified.

Mr. Mosher: Agreeable.

Examiner Gravelle: Proceed.

Mr. Garcia: At this time, Mr. Examiner, I would like to call the public witnesses I have subpoenaed, for their convenience, so they might depart earlier, if Mr. Mosher has no objection.

Mr. Mosher: I have none.

Mr. Garcia: All right. Mr. Mahan.

Examiner Gravelle: Step up here, Mr. Mahan, to be sworn.

Paul R. Mahan, a witness called on behalf of the Commission staff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Examiner Gravelle: Be seated and state your name for the record, please, and your business address.

The Witness: Paul R. Mahan, 5519 Jillson Street, L.A. 22.

Mr. Garcia: Mr. Examiner, this is nothing more than the Witness Fee Statement for this hearing (indicating). I have shown it to Mr. Mosher; and it should be approved by you.

By whom are you employed, Mr. Mahan?

The Witness: By Bateman Brokerage Company.

Q. In what capacity? A. I have no title. I am sales coordinator and expediter and general office man, and what have you.

Q. Do you know Mr. Jim Green, the respondent herein? A. Yes.

Q. Is he present here? A. Yes.

Q. Would you point him out, please? A. At the end over there at the table.

Q. How did you come to know Mr. Green? A. I think when I first knew Mr. Green he came over with

Mr. Tom Ball, of the Lewis Food Company, who was acting as supervisor or sales manager.

Q. Mr. Tom Ball? A. Yes.

Q. And what was Mr. Green's capacity at that time? A. That I couldn't tell you; I don't know.

Q. You don't know? A. I don't know what his capacity was. It wasn't designated.

Q. Were you subpoenaed to these proceedings, Mr. Mahan? A. Yes.

Q. By the staff of the Public Utilities Commission? A. Yes.

Q. Does that, did that subpoena direct you to bring with you certain correspondence files of the Bateman Brokerage Company? A. Yes, sir.

Q. And did you bring those files? A. Yes.

Mr. Garcia: I have, Mr. Mosher—will you examine these?

(Documents handed to counsel)

Mr. Garcia: What are the contents of the files? What do they contain?

The Witness: Well, they contain correspondence to and from the Lewis Food Company, bulletins by Lewis Food Company regarding sales; our bulletins to our salesmen. I think that makes up the majority of it.

Q. I see.

Are these documents then received in the due course of business by you? A. By our office, yes.

Q. By your office. And do you people keep them in the due course of business in your records? A. Yes.

Q. These, then, are business records of the Batemen Brokerage Company? A. Yes.

Q. Thank you.

I have in my hand a series of documents variously indicated. I believe they will speak for themselves.

There are five in my hands. They are white and they contain printed matter thereon, printed or stenciled, with some notations and stampings.

I hand these documents to you and ask you if you recognize them? A. Yes.

Q. Are these documents part of the records you have just described? A. Yes, these are from the 1962 files.

Q. What was that file again? Would you describe it, please? A. The 1962 file.

Q. Correspondence file, is it? A. I think these are classified as miscellaneous. They are mostly sales bulletins.

Q. They are from your records? A. Yes.

Q. I see.

The document indicates a James Green as—and then under that it indicates Sales Department.

Do you know whether that would be the James Green who is the respondent herein? A. Yes, it would be.

Mr. Garcia: Mr. Examiner, I ask that this document be marked for identification, these five doucments be marked for identification at the present time as proper records kept in the due course of business by the Bateman Brokerage Company and acceptable under the business records rule.

I will make argument as to their meaning. I do not want to go into their contents. I believe they will speak for themselves.

Examiner Gravelle: You have examined these, Mr. Mosher?

Mr. Mosher: Yes, I have. I have no objection to their being marked as requested.

Mr. Garcia: And I would also request—well, when I offer them, I will make the offer to request the privilege to withdraw them to make photocopies, if Mr. Mosher does not mind.

Mr. Mosher: No, I don't mind.

Examiner Gravelle: All right, the documents that have been handed to me will be, the five separate sheets of white paper that have been handed to me will be stapled together and marked as Exhibit 1 for identification.

Mr. Garcia: Now, referring you to the document entitled Exhibit 1 for identification, I note there are stampings on there to the effect they were received on various dates, one stamped, for example, on the very first page, "February 14, 1962—B B Co." Do you know what that means?

The Witness: Yes, Bateman Brokerage Company date of receipt.

Q. That would indicate date of receipt in the normal course of business in the Bateman Brokerage Company? A. Same as this one.

Q. I notice some script, there is script on the third page in pencil, "Bateman L.A." and there is script, handwriting, on the last two pages appearing to be an initial. Do you recognize those up here, sir? A. Yes, that is the, this is Dumont Hirsch, H-i-r-s-c-h.

Q. Who is Mr. Hirsch? A. He is a salesman for Bateman Brokerage Company.

Mr. Garcia: Thank you.

I have nothing further of this witness, Mr. Examiner.

Examiner Gravelle: Do you have any questions of this witness, Mr. Mosher?

Mr. Mosher: None.

Examiner Gravelle: All right, you may be excused.

Mr. Garcia: And thank you for coming, sir.

Is Mr. Wade present, please?

Examiner Gravelle: Raise your right hand.

Merle C. Wade, a witness called on behalf of the Commission staff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Examiner Gravelle: Please be seated and state your name and business address.

The Witness: My name is Merle C. Wade. I am a former health officer with the State of California. My home is 6547 Riverton Avenue, North Hollywood, California.

Mr. Garcia: Mr. Wade, do you know the respondent, James Green?

The Witness: Yes, I do.

Q. Is he present here? A. He is.

Q. Would you point him out, please? A. The gentleman right there.

Examiner Gravelle: Let the record show that the witness indicated the respondent.

Mr. Gracia: Pardon me, off the record.

Mr. Wade, is it?

The Witness: That is correct, yes.

Q. How did you come to know the respondent? A. For a number of years I worked as the health officer at that cannery. I met him in my work. He was—

Q. What company are you referring to? A. Lewis Food Company, 817 East 18th Street, Los Angeles.

Q. What was his capacity? A. Sales Manager.

Q. How did you come to that knowledge? A. Seeing him in the office, speaking with him, associating with him.

Q. When did you last know him to be Sales Manager? A. September of '63.

Q. Of 19— A. When I left.

Q. September? A. September '63, when I left; he was Manager at that time.

Q. Of Lewis Food Company? A. Yes.

Mr. Garcia: I have nothing further of this witness, Mr. Examiner.

Examiner Gravelle: Mr. Mosher, do you have any questions of this witness?

Mr. Mosher: No, none.

Mr. Garcia: Would you fill this out, please? May I have a moment, please.

Examiner Gravelle: The witness may be excused.

Mr. Garcia: Sign down here, please.

The Witness: At the bottom.

Mr. Garcia: Thank you, Mr. Wade.

Mr. Mosher, I am going to hand this document to the Examiner. It is just the Witness Fee Document.

Thank you, Mr. Wade, you are excused.

At this time, Mr. Examiner, I would like to call Mr. Jerome Hannigan to the stand.

Examiner Gravelle: Raise your right hand.

Jerome B. Hannigan, a witness called on behalf of the Commission staff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Examiner Gravelle: Please be seated and state your name and business address for the record.

The Witness: My name is Jerome B. Hannigan, H-a-n-n-i-g-a-n. My address is State Building, San Francisco. I am employed by the California Public Utilities Commission as an Associate Transportation Representative.

Mr. Garcia: How long have you been so employed, Mr. Hannigan?

The Witness: Approximately seven years.

Q. Do you have experience in the transportation industry aside from your state experience? A. Yes. Prior to that time I was a traffic manager of a trucking company subject to the regulation of the Public Utilities Commission for about 10 years.

Q. And what are your educational qualifications? A. Besides a couple years of college, I have got a certificate in traffic management and an ICC practitioner's license.

Q. Within the scope of your duties with the Public Utilities Commission, did you have occasion to investigate the respondent? A. Yes.

Q. When was that investigation conducted? A. Well, there were two occasions, actually, one in May of 19— March of 1962 and again in June of 1962.

Q. Where was the investigation conducted? A. At the offices of the Lewis Food Company on East 18th Street in Los Angeles, where the respondent maintains a small shipping office and also at his home, 5165 Veronica Street, Los Angeles.

Q. Do you know whether the respondent has operating authority issued by the Public Utilities Commission? A. Yes, he does.

Q. And what is that authority? A. He has three permits. There is Radial Permit No. 19-53520.

Examiner Gravelle: Pardon me, read those numbers again, please.

The Witness: 19-53520, issued on October 14, 1960.

He was a Highway Contract Permit No. 19-53521, issued on October 14, 1960.

And he has a City Carrier's Permit No. 19-53522, also issued on October 14, 1960.

Mr. Garcia: Do you know whether that information is contained in the files of the Public Utilities Commission? A. Yes, it is.

Q. And in which file would that be contained? A. It is under the carrier's file.

Q. Do you know the number of that file? A. Yes, it is T-68194.

Mr. Garcia: I see.

Mr. Examiner, to the extent that Mr. Hannigan has testified as to the carrier's operating authority, I ask that the numbers he has testified to as found in the official records of the Commission, that that portion of the file be incorporated by reference herein, and nothing more.

Examiner Gravelle: Any objection, Mr. Mosher?

Mr. Mosher: None.

Examiner Gravelle: All right, consider that as incorporated by reference.

Mr. Garcia: Does the respondent, has the respondent in his possession—pardon me, let me rephrase that.

Do you know whether the respondent has received Minimum Rate Tariff No. 2 and supplements thereto?

The Witness: Yes.

Mr. Mosher: May I have that reread, please? I didn't hear it.

(Record read)

Mr. Garcia: Do you know whether he has received Distance Table No. 4?

The Witness: Yes, he has.

Q. How did you acquire that information? A. Well, from the records of the Commission. I also observed them at the carrier's home, and Mrs. Green stated that she does regularly receive the supplements.

Q. I see.

At the time of your investigation did the respondent have operating equipment? A. Yes, he did have one piece of equipment.

Q. And what was that equipment? A. It was a 1961 Chevrolet tractor. He was purchasing it from the Lewis Food Company and leasing it back to the Lewis Food Company.

Q. Did the respondent then use the equipment after leasing back to Lewis Food Company? A. No, he didn't.

Q. And how does the respondent perform the activities under his operating permits? A. Well, he operated solely through the use of subhaulers. That is, other carriers performed all of the transportation.

Q. I see.

Do you know how many shippers he served? A. Just one.

Q. And who was that shipper? A. The Lewis Food Company.

Q. Does the respondent, to your knowledge, presently possess operating equipment? A. No, he doesn't.

Q. And how did you acquire that information? A. On the respondent's equipment list last filed with the Commission for 1963, it is stated there is no equipment at present.

Q. What was the date of filing of that, please? A. I don't know, the file there, it is the "T" jacket there (indicating).

(Document handed to counsel)

Mr. Garcia: Let the record show, Mr. Examiner, that the equipment registration list that the witness was referring to has been shown to respondent's counsel. And I now hand the list and file to the witness.

What is the date of filing indicated thereon?

The Witness: Public Utilities Commission State of California stamp-dated February 18, 1963.

Mr. Garcia: I ask that that form in jacket 68194, the License and Compliance Branch of the Public Utilities Commission, that form solely, be incorporated by reference herein.

Examiner Gravelle: Any objection?

Mr. Mosher: No objection.

Examiner Gravelle: It will be incorporated by reference.

Mr. Mosher: Is there anything else in that file?

Mr. Garcia: No, just the form as described.

Mr. Mosher: All right, I have no objection.

Mr. Garcia: Do you know what the shipper, the respondent's operating revenues are?

The Witness: Yes.

Q. And what are they? A. For the last quarter—

Mr. Mosher: This is the type of thing, Your Honor, I want to be sure I have an objection reserved to. You understand that?

Mr. Garcia: Yes.

I take it you object on the grounds of relevancy?

Mr. Mosher: Yes, obviously, and on the grounds of hearsay.

Mr. Garcia: We can go through the same procedure and incorporate the Commission's records.

Mr. Mosher: May we include—well, I think it is covered, any and all objections that may be—

Examiner Gravelle: If there are any objections to be made, let's make them to the Bench and have them ruled on instead of having arguments back and forth between counsel.

It is understood that you do have a continuing objection. If you want to make further objections—

Mr. Mosher: Yes.

Examiner Gravelle: —specifically, then, please proceed to do so.

Mr. Mosher: Well, with the understanding that we have a continuing objection reserved, I, nevertheless, specifically object to this on the ground it is incompetent, irrelevant and immaterial, what Mr. Green may have earned, and also on the ground it is hearsy, has no foundation laid.

Examiner Gravelle: Do you have any reply, Mr. Garcia?

Mr. Garcia: Yes, Mr. Examiner.

With regard to the relevancy, that material is relevant to regulation by this Commission. Here we are not only concerned with the specific proceeding but also with regulating the carrier. We are not merely concerned with what might be alleged in the Order Instituting Investigation.

In this regard I am sure the Commission regards the operating revenues of the respondent as quite mate-

rial when it considers how the respondent might be treated.

With regard to the foundation I believe that I don't have to ask that of this witness. I believe that the respondent is required by the Commission to file these revenues in the files of the Commission, and certainly this, the Examiner can take official notice thereof.

Examiner Gravelle: Any reply, Mr. Mosher?

Mr. Mosher: No, I accept that.

Examiner Gravelle: All right, I overrule the objection.

Answer the question.

The Witness: The revenue figures for the last four quarters ending with the third quarter of 1963 was $261,942.

Mr. Garcia: How did you acquire that information, Mr. Hannigan?

The Witness: I obtained this information from the Commission's files, the revenue figures, as presented by the carrier.

Q. You mean as filed by the carrier? A. As filed by the carrier.

Q. And what would that report be? A. It is a quarterly report. It is filed by the carrier every three months.

Q. And what was the date of that report? A. Well, the first one was the fourth quarter of 1962 and during the first three quarters of 1963. Those were the last figures that were available.

Mr. Garcia: I see.

Mr. Examiner, I ask that those figures as filed by the carrier with the Public Utilities Commission, that that portion of that report be incorporated herein by reference, and nothing more.

Examiner Gravelle: Any objection to that, Mr. Mosher, specifically?

Mr. Mosher: None, no specific objection, no, any further than is reserved throughout.

Examiner Gravelle: All right.

You may consider that as incorporated by reference.

Mr. Garcia: Does the respondent have employees?

The Witness: Yes.

Q. How many? A. It has one shipping clerk; one shipping clerk.

Q. Would you describe the office at the, I believe you indicated the Lewis Food Company premises? A. Yes. There is a small shipping office with two desks in it. It is located on the far side of the Lewis Food Company warehouse.

As you enter from the street level and walk to the opposite end of the warehouse, there is this small shipping office with a sign at the top, a small sign says Jim Green Trucking Company.

Q. I see.

Is there any sign at the exterior of the Lewis Company premises indicating that Jim Green Trucking is located therein? A. No.

Q. Is the respondent carrier listed in the telephone directory of the area? A. No.

Q. How would you reach the respondent by telephone then? A. If you wanted to call Jim Green Trucking Company, you would have to call the number listed to the Lewis Food Company.

Q. Referring, directing your attention again to the office of Jim Green in the Lewis premises does Mr. Green use that office? A. To my knowledge no.

Q. Would you explain what you mean by your knowledge? A. Well, I was only in there on three dif-

ferent occasions, and it was being used by two other persons, one, the shipping clerk and one, the transportation manager of the Lewis Food Company.

Q. I see.

Does Mr. Green have an office other than this office at the Lewis premises? A. Yes.

Q. And where is that office located? A. It is upstairs in the Lewis Food Company.

Q. Lewis Food Company what, Mr. Hannigan? A. The Lewis Food Company sales office.

Q. Does the respondent advertise? A. No.

Q. On what specific date did you first call on the respondent? A. March 12th, 1962.

Q. Was that at the Lewis Company premises, the Lewis Food Company? A. Yes.

Q. And what transpired on those premises at that time? A. I presented my card to the receptionist and asked for Mr. Jim Green. She directed me to Horace Lewis, the transportation manager of Lewis Food Company, stating that Jim Green was the sales manager. I repeated that I did want to see Mr. Jim Green, and she then—

Mr. Mosher: Your Honor, may I address comments to Mr. Garcia in this connection?

Our stipulation covers hearsay also.

Mr. Garcia: Certainly. I wish, though, that at this time you would make an objection to that.

Mr. Mosher: Well, I object to anything that the girl might have told him, on the grounds that it is hearsay.

Mr. Garcia: All right. May I be permitted to answer?

Mr. Examiner, that girl, I understand, was the receptionist. Now, as a receptionist of that company, it is

her duty to identify and indicate personnel. To that extent she had the authority and was the agent of that company to admit that thus and so has a certain title in that company. So she was an agent for making an admission on behalf of the company to that extent only. That was her duty in the course of her business activity; and, as such, it is an exception to the hearsay rule.

Mr. Mosher: I have heard no evidence, Your Honor, that that is true. Mr. Garcia makes a good witness. But what her duties are or may be or may not be, I don't know what he knows about it.

Mr. Garcia: I believe I will lay a foundation.

Mr. Mosher: Actually I don't think it is important, though, so I will withdraw the objection.

Mr. Garcia: Thank you.

Mr. Mosher: There are so many things in what he has said already that could be objected to that I am going to rely on our general objection; and let's hear the story. We have nothing to conceal.

Mr. Garcia: Where was the girl located that you referred to?

The Witness: As I recall it was on the second floor or mezzanine. You had to go upstairs to get to the office part of the building. There was a small lobby at the top of the stairway; and as you approached the top of the stairway, there was a doorway. I don't know that it actually said "Office," but it was the only appropriate door that you could go into.

So I went in there through that door, and this receptionist was right inside in sort of a glassed-in enclosure. There was the telephone board and receptionist type of, information type of desk.

Q. Was there a label "Receptionist" there? A. I don't know tha tit actually said "Receptionist." It may have said "Information" or—

Q. I see. A. I couldn't say. I don't recall really, but it was receptionist type.

Q. Did you see Mr. Green? A. Yes.

Q. And what transpired at that meeting? A. Well, I asked Mr. Green for his records. He informed me that the records were kept at his home and that I could go there and get them, that his wife had custody of the records, and that he would call her and instruct her to give me the various records and any information that I needed as far as my review or study of the operations.

Q. What type of records were these that you are referring to? A. Well, they were the various transportation records, accounting records, shipping records, lease records, contracts.

(Document shown to counsel)

Mr. Garcia: May I have the last question read back, please?

(Record read)

Mr. Garcia: Of whom?

The Witness: Of the Jim Green Trucking Company.

Q. Did you depart from the premises at that time? A. No, I remained at the home at 5165 Veronica, where there is an area there that they use for office.

Q. Pardon me. I understood you were at the warehouse. Now you are at Veronica. A. Well, after Mr. Green called Mrs. Green stating that I would be over there, he explained how to get to the home. And then I went out to the home and saw Mrs. Green.

Q. I see. And what transpired at the home? A. And Mrs. Green provided me with the various records

and explained the operations and gave me whatever information and data I needed.

Q. I see.

Did you abstract any of those documents? A. Yes, I did.

Q. And make photocopies thereof? A. I made photocopies of a number of them.

Mr. Garcia: I see.

Mr. Mosher, I would like to have the photocopies marked at the present time. We will certainly give you an opportunity to examine them later.

Mr. Mosher: For identification?

Mr. Garcia: For identification, yes.

I have in my hand a series of documents entitled, "James Green, DBA—Jim Green's Trucking Company —5165 Veronica, Los Angeles, California."

I hand that to you and ask you if you recognize the contents thereof?

The Witness: Yes. These are the records that I photostated from the records of the respondent.

Q. The ones you have just referred to? A. Yes.

Mr. Garcia: Fine.

Mr. Examiner, perhaps we can prepare this in better form for you. I will have it marked later. It is falling apart at the present time.

Did you then review these documents?

The Witness: Yes, I did.

Q. For how long? A. Well, originally for three days, March 12, 13th and 14th; I examined the records and made a study of them before returning them to Mrs. Green.

Q. Did you return them to Mrs. Green? A. Yes.

Q. When? A. On March 14th.

Q. At the home on Veronica Street? A. At the home on Veronica Street, Los Angeles.

Q. And what transpired then? A. I asked Mrs. Green certain questions pertaining to the operation. I asked her—

Q. The operation of what? A. I asked her questions pertaining to the operations of Jim Green Trucking as compared to the operations of the Certified Transport. I asked if the operations weren't similar to the Certified Transport operations, and she said they were exactly the same and in most cases except for the dissolution of a partnership at that time.

Q. This was told to you by— A. By Mrs. Green.

Q. And did she explain what she meant by "partnership"? A. Yes. She didn't exactly explain it, because we both understood what the partnership was.

Examiner Gravelle: Wait a minute, now.

Mr. Mosher: Your Honor, I object to anything Mrs. Green may have told him as to the nature of the operations, similarity or dissimilarity from past operations. She is not a party to this proceeding. As far as I know she is not a witness. It is hearsay and not the best evidence. It is incompetent, irrelevant and immaterial to any issue even suggested by the document which was served on respondent.

Examiner Gravelle: Are you referring to the Order Instituting Investigation, Mr. Mosher?

Mr. Mosher: Yes.

Mr. Garcia: Well, Mrs.—Mr. Green, in answer to the representative's request for records was directed to Mrs. Green with the information that Mrs. Green would provide all, whatever was necessary. In that

respect she was his agent for making admissions on these documents.

Examiner Gravelle: Any reply, Mr. Mosher?

Mr. Mosher: Well, as to documents, Your Honor, I have no objection other than the reserved objection to an of these documents. The document speaks for itself. That is the best evidence, but—

Examiner Gravelle: Mr. Hannigan, you were previously asked by—

Mr. Mosher: I might further—excuse me, Your Honor.

Examiner Gravelle: —by Mr. Garcia how you came to go from the warehouse to the Green's residence; and you replied, I believe, that you were referred there by Mr. Green?

The Witness: That is correct.

Examiner Gravelle: Now, what did he say to you in referring you to his residence to supply or to secure or look at records?

The Witness: Well, he said that all of his records were kept at his house, that his wife did most of that, the rating, billing, filing, and so forth, that she had the records; and he suggested that I go to his home and see her.

I asked if she was home, if he knew that she was home. He said, I will call her and tell her you are coming and have her have the stuff ready or advise you as to what you want or give you any information that you need or want.

So he telephoned. Then he came out and advised me that she was home and that I could go out there and get whatever I needed.

Examiner Gravelle: Well, I will overrule the objection. The witness may continue to answer along that line.

Mr. Garcia: Would you read back the portion of his answer, please, in answer to my question?

(Record read)

Mr. Garcia: You said you both understood what the partnership was. That isn't clear. Would you explain that?

The Witness: Well, we discussed the former operations, operations of the Certified Transport; and Mrs. Green explained that she didn't feel there was anything improper about that operation and she didn't understand why there had even been a prior hearing with the Certified Transport in which she had been a part—

Mr. Mosher: May I interrupt.

I am going to make a specific objection to this, adding to it that it is an effort to have the wife testify against her husband; and that violates the privilege.

Mr. Garcia: May I reply to that?

Examiner Gravelle: Wait a minute.

Are you through with the objection?

Mr. Mosher: Yes.

Examiner Gravelle: All right, now, you may reply.

Mr. Garcia: Mr. Examiner, the privilege, the husband and wife privilege extends to communications between husband and wife and not to communications of wife to third parties, expecially in regard to a business matter in which one is acting as the agent of another.

I cite Tanzola versus De Rita 45 Cal 2d 1.

Examiner Gravelle: 45 Cal 2d?

Mr. Garcia: 1.

Examiner Gravelle: 1.

Would you proceed, please.

Excuse me. Any further reply, Mr. Mosher?

Mr. Mosher: No.

Examiner Gravelle: All right, I will overrule the objection.

Proceed.

The Witness: Well—

Mr. Mosher: I might observe, though, Your Honor, that I know Your Honor wants to handle this in accordance with some rules of evidence.

This witness is throughout assuming that he knows what goes on in Mrs. Green's mind and putting together a lot of conclusions from things which aren't even related to the court, such as, we had discussed the operations of Lewis Food Company, and so forth. It is all a conclusion, amost everything that he has said, and he is not testimonially qualified to testify to these things, at least without explaining to us the basis for his qualifications and his beliefs.

And most of it I don't care about, but if he is going to argue the case, I submit that he should be counsel and not a witness. He is not testifying as to the records.

And he has brought in the records, and that is the extent of it. Such thing as the home he is talking about, how does he know it is a home? It may have been an office with sleeping quarters and a kitchen attached to the office.

Examiner Gravelle: I think you will have an opportunity to bring that out on cross-examination, Mr. Mosher.

Mr. Mosher: Very well. I just want to explain why I object to it. It isn't actually to conceal anything.

Your Honor has the record of what went on in that other proceeding, and we have nothing to conceal.

Examiner Gravelle: Well, you need make no apology to the Bench for any objections you make, Mr. Mosher, certainly.

Mr. Garcia: Just by way of reply, I do agree with what Mr. Mosher has been saying. It is our point here to introduce his testimony only questions that he asked of the lady and answers.

I am sure Mr. Mosher will recognize that when the record is developed. It is not my intent to here have Mr, Hannigan produce conclusions or arguments.

Examiner Gravelle: All right.

Let's take a 10 minute recess at this time.

Mr. Garcia: Fine.

(Recess taken)

Examiner Gravelle: The Commissioner will be in order.

Proceed, Mr. Garcia.

Mr. Garcia: Do you know whether Nell Green had an interest in Certified Transport?

The Witness: Yes.

Q. And how did you know that?

Examiner Gravelle: Wait a minute, who is Nell Green?

Mr. Garcia: Mrs. Green, I'm sorry.

Examiner Gravelle: All right.

The Witness: I asked her.

Mr. Garcia: I see.

And what was the interest? A. She was a partner.

Q. Under the name of, as Mrs. Green or under another name? A. No, at that time it was under the name of Nell V. Lewis.

Q. When were the permits of the respondent carrier issued to him? A. They were issued in October 1960.

Q. Did respondent commence operations under the permits at that time? A. No, he did not. As a matter of fact, he—

Q. No, please; please don't volunteer.

Do you know why he did not? A. Yes. Because he voluntarily put his permits in suspension in December 1960.

Q. And how did you acquire that information? A. From the Commission records.

Q. Which records? A. The application to suspend permits is the document that is on file with the Commission.

Q. Is that in the file, License and Compliance File 68194? A. Yes, it is.

(Dcoument shown to counsel)

Mr. Garcia: Mr. Mosher, this is the document that he is referring to.

Mr. Examiner, at this time I ask that that application for voluntary suspension of permit found in License and Compliance File 68194, that would be T-68194, dated 7 December 1960 be incorporated, just that part of the file, be incorporated herein by reference.

Examiner Gravelle: Any specific objection, Mr. Mosher?

Mr. Mosher: That is just this form here (indicating)?

Mr. Garcia: Just this form.

Mr. Mosher: No, I have no objection.

Examiner Gravelle: All right. Consider it incorporated by reference.

Mr. Garcia: Do you know why he voluntarily suspended his permits?

The Witness: Yes.

Q. What would be the reason? A. As stated on the application, he was gainfully employed elsewhere.

Q. Did Mr. Green explain what he meant by that to you personally? A. No. Oh, not—

Q. By gainful employment? A. Yes.

Q. When did he explain it to you? A. On June 22nd it was that I called Mr. Green by phone and asked—

Examiner Gravelle: 22nd of what year, Mr. Hannigan?

The Witness: 1962.

Examiner Gravelle: All right.

The Witness: I asked him if his duty, if the duties he had performed with Certified Transport were similar or the same as what he was now doing under the Jim Green Trucking Company; and he stated that they were substantially the same, except that Mrs. Green did much of the rating and billing now that he had done, and that now he was in the role of owner rather than employee.

Mr. Garcia: Do you mean that he was employed by Certified Transport?

The Witness: That is correct, yes.

Q. When did Mr. Green reinstate his permits? A. On October 10th, 19....

Q. Did he, first of all? A. Oh, yes, he did.

Q. And when was that? A. On October 10th, 1961.

Q. And how did you acquire that information? A. From the records of the Commission.

Q. The same file? A. The same file, same carrier's file.

Q. Would you locate that in the file for us, please? A. This is the file that we have. It is labeled as Notice of Reinstatement Voluntarily.

Mr. Garcia: Mr. Mosher, I believe that would be the last part of this file, if you will examine that.

(Document shown to counsel)

Mr. Garcia: I ask that the portion of the file previously referred to, Mr. Examiner, containing the document entitled Notice of Reinstatement of Voluntarily Suspended Permits, with the notations thereon, that portion of the file be incorporated by reference herein.

Examiner Gravelle: Is that a document that was filed by the respondent?

Mr. Garcia: No, this was a notice sent by the Commission to the respondent of the reinstatement.

Examiner Gravelle: Was that done pursuant to any action by the respondent?

Mr. Garcia: I understand that under our rules it has to be pursuant to the respondent's request; but at the present time I have difficulty finding it in this file, Mr. Examiner.

Examiner Gravelle: Do you have any specific objection, Mr. Mosher?

Mr. Garcia: Oh, here it is. I'm sorry, here it is.

Mr. Mosher: We will stipulate that he requested the reinstatement, Your Honor.

Mr. Garcia: Well, fine. It is also contained in the file, Mr. Examiner. I'm sorry.

Examiner Gravelle: All right. That portion of the file just referred to will be deemed incorporated by reference.

Mr. Garcia: And when were the permits reinstated?

The Witness: October 10, 1961.

Mr. Garcia: Mr. Examiner, I ask the Bench to take official notice of the act of the Supreme Court of the State of California in Docket No. S.F. No. 20772, La Verne M. Villierme and Nell V. Lewis, dba Certified Transport versus Public Utilities Commission of the State of California. The act that I ask that this Bench take official notice of that court is that on October 4th, 1961, it denied the petition for writ of review in that proceeding, S. F. No. 20772. That is not a reported decision but found in the records of the Supreme Court of the State of California and as an official act.

Examiner Gravelle: All right, the Commission will take notice of the decision of the Supreme Court in that matter.

Mr. Garcia: Of the date?

Examiner Gravelle: And the date referred to as October 4th, 1961.

Mr. Garcia: After that, what was the date of that call?

The Witness: That was on June 22nd, 1962.

Q. Did you have occasion to contact Mr. Green again?

Examiner Gravelle: Excuse me for interrupting, counsel.

Just for clarification of the Examiner here, this matter, S. F. No. 20772, Villierme versus PUC, is this—

Mr. Garcia: It was an appeal from Decision—doing business as Certified Transport, as the title, and it is an appeal from the decision of the respondent Public Utilities Commission in that matter. I believe I have cited the decision, and it is in the Order, Order Instituting Investigation.

Examiner Gravelle: I wanted to be sure we were talking about the same thing.

Mr. Mosher: I might observe, Your Honor, so that you may have all facts, there is no one connected with that proceeding who is a party to this proceeding whatever. And, obviously, I have no objection to the Examiner taking judicial notice of decisions of our courts; so I have nothing further to say, but so that you may understand, there is no party to that proceeding in this proceeding.

Also I would like to inquire, Your Honor, if I may ask Mr. Garcia and/or the witness, what the witness is testifying from up there? If he is testifying from his recollection or—

The Witness: Mostly memory. But like numbers and dates—

Mr. Mosher: "Mostly" doesn't mean anything. Are you remembering this or are you reading it?

The Witness: No, I'm remembering it.

Mr. Mosher: Well, why don't you put the notes away?

The Witness: Because I am refreshing my memory from my work notes.

Examiner Gravelle: Excuse me, now. You have some documents in front of you, Mr. Hannigan?

The Witness: Yes.

Examiner Gravelle: All right. Mr. Garcia, why don't you show those to Mr. Mosher.

Mr. Garcia: Certainly.

What else do you want?

The Witness: Those are my work notes.

(Documents handed to counsel)

Mr. Mosher: I would like to read these, Your Honor, if I may have just two or three minutes.

Examiner Gravelle: All right. We will go off the record briefly.

(Off the record)

Examiner Gravelle: Back on the record.

Mr. Garcia: Mr. Hannigan—

Examiner Gravelle: Let the record show while we were off the record Mr. Mosher examined some of the documents which the witness had in front of him while he was testifying and has requested the right to further review those documents.

Let the record also show the witness no longer has those documents in front of him but they are in front of counsel at the table.

Now, please proceed.

Mr. Garcia: Mr. Hannigan, referring to these documents, did you make these at the time of your investigation?

The Witness: I believe all but the top one. The top one is just a chronological list of various things that I made for my own recap or summary.

Q. And does that chronology reflect the notes contemporaneously made of your investigation? A. Yes.

Q. I see. We can do away with them.

When did you next contact the respondent, I believe after, I believe you testified 6-22? A. I had contacted him on June 18th.

Q. I am not interested in that. After June 22nd did you contact him again? A. Well, I contacted him before June 22nd. This was just to clear up one point that I called him on June 22nd.

Q. I see. A. On June 18th I did go over and see Mr. Green at the offices of Lewis Food Company.

Q. I see. What transpired on the 18th? A. When I asked him if he was employed by the Lewis Food

Company, he said that he was not. I asked him if he was compensated in any way by the Lewis Food Company for any duties that he performed; and he said that he was not.

And I inquired as to how he happened to appear in the payments and allowance cases in August of 1961 as a representative of the Lewis Food Company.

Q. What is the payments and allowance case? A. It was a case held on, I believe, on the initiative of the Commission to determine various payments and allowances for handling, for one thing and another, freight handling and accessorial charges.

Q. Did Mr. Green testify in that proceeding? A. Yes, he did.

Mr. Garcia: Mr. Examiner, I have before me—that case number was Case No. 5330; and I have an extract of transcript here which I will show to Mr. Mosher.

(Document shown to counsel)

Mr. Mosher: Well, I object to this, if the Examiner please.

Examiner Gravelle: Just a moment. Nothing, I don't think anything has been offered to the Bench as yet.

Mr. Garcia: Well, Mr. Examiner, I propose that page 66 of the transcript in Case 5330, August 1961, be incorporated herein by reference solely for the purpose of showing that James R. Green appeared on behalf of the Lewis Food Company and for no other purpose as to anything that was said therein or done. This is an abstract thereof.

(Document handed to the Bench)

Mr. Garcia: I believe the record itself will show the appropriate dates. I am not going to ask that that document go in.

Examiner Gravelle: You made a motion. Would you mind repeating that motion.

Mr. Garcia: My motion was that page 66 of official transcript in Case 5330 dated the month of August 1961, that that page be incorporated by reference herein for the purpose of showing that Mr. James R. Green represented, appeared representing Lewis Food Company in that proceeding, and no other purpose.

Mr. Mosher: I object on the grounds covered by our continuing reservation and stipulation, and also on the ground that it is, the matter offered is hearsay and not the best evidence; and it is being offered, apparently, for impeachment, and is improper on that ground at this stage.

Mr. Garcia: I think the record, the official record is the best evidence of that proceeding; and it is a matter of record that James R. Green did appear. And Mr. Hannigan just testified, I believe, that he told him he did; or, if not, we will lay that foundation. Certainly it is material, the relationship between Mr. Green and Lewis Food Company is very material to this proceeding. And I am only offering that specific portion of that specific issue, the issue of what specific relationship did Mr. Green have with Lewis Food Company, the shipper.

Examiner Gravelle: Well, Mr. Garcia, would it be agreeable to you if the Commission took official notice of page 66—

Mr. Garcia: Yes.

Examiner Gravelle: —of the official transcript in Case 5330—

Mr. Garcia: Yes, sir.

Examiner Gravelle: Instead of incorporating that page by reference?

Mr. Garcia: Yes, sir.

Examiner Gravelle: All right, the objection made will be overruled. And the Commission will take notice of page 66 of the official transcript in Case 5330 dated August what?

Mr. Garcia: It is August 31.

Mr. Mosher: '61.

Mr. Garcia: '61, I'm sorry. I don't have the exact date. But there is only one transcript for that month and one page number.

Examiner Gravelle: All right, dated August of 1961.

Mr. Mosher: If the Examiner please, in view of counsel's statement about the materiality, I don't want anything that he said to be construed as acquiescence on our part or an admission that it is material in any way in this case or that it is supporting the connection between the witness and Lewis Food Company or between the respondent and Lewis Food Company.

Mr. Garcia: Mr. Examiner, I would like to repeat to counsel and to the Bench that anything I say in keeping with canons of judicial ethics I consider strictly argumentative and in certainly no manner in representing that I am testifying. I wish to assure you of that, Mr. Mosher.

Examiner Gravelle: All right, let's proceed.

Mr. Garcia: I believe you testified that you contacted Mr. Green on—what date was that again?

The Witness: June 18th, 1962.

Q. And did he indicate to you that he had appeared in Case 5330? A. Yes.

Q. And did he indicate to you in which capacity he so appeared? A. Yes.

Q. What was that capacity? A. He stated that he appeared as a salesman at first, and then he corrected

himself and stated that he did it more in an advisory capacity or as a favor to the Lewises.

Q. I see.

Did he receive remuneration for the appearance? A. Reimbursement of expenses only.

Q. Does he receive any salary from Lewis Food Company? A. In reply to my question of whether he did, he stated he did not receive any compensation from Lewis Food Company.

Q. At any time? A. At any time, right.

Q. After the 22nd of June, '62, did you again contact him? A. Yes, I called Mr. Green again on October 2nd, 1962; and as I did in, on the first call, I—

Q. Well, please, if you didn't say anything with regard to the first call, omit that.

What transpired on that date when you called Mr. Green? A. I called Mr. Green at the offices of the Lewis Food Company and—

Q. In person was this? A. I telephoned.

Q. I see. A. I telephoned the number that was listed to Lewis Food Company. I believe it was RIchmond 9-5105, whatever the number is in the phone book, anyway; and I asked for the Sales Manager, and the operator connected me with Mr. Green.

Q. How do you know it was Mr. Green? A. I recognized his voice, and I asked if this was Mr. Green.

Q. I see. What was the date of that? A. That was on October 2nd, 1962.

Q. Now, with regard to—Mr. Green informed you that he received no compensation for anything connected with representing the Lewis Food Company in Case 5330. Did he indicate that he received compensa-

tion for anything else? A. Yes. He stated that he received expenses, that he was reimbursed for his expenses.

Q. Just expenses. In doing what? A. Whenever he traveled to the San Francisco Bay area or in and around Los Angeles for Lewis Food Company.

Q. Apart from expenses, did he indicate any other remuneration? A. No.

Q. Did he tell you that he received no salary at all from Lewis Food? A. Yes.

Mr. Garcia: I have nothing further, Mr. Examiner.

Mr. Examiner, if you will recall, I previously was going to ask that a document be marked for identification later to be offered. I want to reserve the right to have that document marked and offered.

Examiner Gravelle: Mr. Garcia, why don't you bring the document up here, and I will mark it now, and you can withdraw it and put it in proper form.

Mr. Garcia: The thing is, I don't see where you could mark it.

Examiner Gravelle: All right, I have been handed a document bound in hard brown folders which states on its face, "James R. Green, DBA Jim Green's Trucking Co.—5165 Veronica, Los Angeles, California."

Mr. Mosher, you previously examined these documents?

Mr. Mosher: Well, is this the large file that we—well, no, I haven't really, Your Honor. I believe, though, that we can spot check it and on Mr. Garcia's assurance, I would be willing to, I am confident to make no objection on the grounds that there is not copies; and I hope we could do that during the noon hour.

Examiner Gravelle: Well, that is certainly your prerogative.

This will be marked for identification as Exhibit No. 2.

And I will return Exhibit 2 for identification to Mr. Garcia for examination by Mr. Mosher and for reassembly.

Now, Mr. Garcia, you have completed your examination of this witness?

Mr. Garcia: Excepting for the—I started to do it before, ask him if these were the documents that you abstracted from the records of the Jim Green Trucking Company?

The Witness: Yes, they are.

Q. And what did you do with them? A. Well, I prepared photostatic copies. There are certain documents in there where the photostat came out rather lightly. I did write in certain figures that didn't come out legibly but I copied them from the original document.

Mr. Mosher: May I ask, Your Honor, what you mean, Mr. Hannigan, by abstracted in this instance? These appear to be complete copies to me.

The Witness: Well, I took the original document and photostated it. Those are the photostatic copies of the original document.

Mr. Garcia: It means that—I believe I can explain it.

Mr. Mosher: I would be glad to have your explanation.

Mr. Garcia: My question, what I mean by abstracting is Mr. Hannigan did not take a series of documents in total, but rather would pick up this one document and then another, rather than a series of consecutive documents. That is what I mean by abstracting.

The Witness: I took certain representative ones. There was no particular pattern as to how I took them.

Mr. Garcia: That is what I meant by abstracting.

Mr. Mosher: Well, I thought perhaps you meant that he had abbreviated the document, paraphrased it in someway.

Mr. Garcia: No, not at all. That is not my intent.

Did you transmit these documents to the Rate Analysis Unit of the Commission?

The Witness: Yes, I did.

Mr. Mosher: Well, these are not complete and consecutive by-the-day documents, then, of the operations which they bear on?

Mr. Garcia: Could you answer that question?

The Witness: Well, I took a rather large period. I took from October of '61 through April of '62. To have included all those documents would have been an extremely voluminous file, so I took just certain representative ones that indicated the type of shipments that the Jim Green Trucking handled.

Mr. Garcia: This document has 13 parts. What does —does each part represent a transaction?

The Witness: Each part indicates one master bill on which a number of component deliveries or split deliveries have been made. You might consider it as 13 shipments, 13 master shipments with component shipments to each point.

Mr. Garcia: Does that explain it to you? In other words, each one is a complete shipment.

Mr. Mosher: I am afraid I would have to be a trucker to fully understand it.

But what I want to get clear, perhaps this isn't the proper point to bring it up, but these do not reflect a continuous operation for any given period of time, they are representative documents, as you say and I don't

know what representative means to you, but they are selected documents, isn't that true?

The Witness: They are typical of the carrier's operations. That is the type of transportation the carrier is performing. Those are the documents he has in his records, and those are the types of shipments he is making.

Mr. Mosher: But the ones that you pulled, Mr. Hannigan, and the ones which are supplied here are what you regard as representative of Mr. Green's operations?

The Witness: That is correct.

Mr. Mosher: They are, they do represent, though, and comprehend a selection by you; you didn't just reach in the barrel or in the drawer and pull out a lot of forms and put them in a package and hand them to counsel?

The Witness: No, I selected—

Mr. Garcia: Pardon me. I believe you are getting into cross-examination.

Mr. Mosher: As I say, perhaps I am out of order.

Mr. Garcia: Let me ask you this: what do you mean by "representative," Mr. Hannigan?

The Witness: Well, the carrier's transportation is limited to the specific type of deliveries, that is, haul Lewis Food shipments out of Los Angeles to various points in the northern part of the state through subhaulers. Each shipment is made on a master bill, generally on a master bill. There are exceptions. But generally they are shipped on a master bill including a number of various component parts.

I selected a number of these typical shipments and photostated the records of them. It could have been the same number of any other records.

Examiner Gravelle: For clarification here, the documents that you selected did reflect one complete transaction of transportation, is that correct?

The Witness: Yes. Each part represents one particular master bill shipment; and there are some 13 or more separate master shipments.

Examiner Gravelle: I see.

Does that clear anything up for you, Mr. Mosher? Understanding, of course, that the witness, as I understand it, certainly had to exercise some judgment in which transactions he would extract from the respondent's records.

Mr. Mosher: Your Honor is bringing into focus my question about this thing. That is really what I want to know, why he selected X instead of Y, or whether he did, so that I will understand the exhibit.

Examiner Gravelle: I think that should properly be covered on cross-examination; and you will certainly have an opportunity to go into that fully.

Mr. Mosher: I felt that would be the proper place to do it, but I wanted first to understand I knew what this was.

Examiner Gravelle: You do understand?

Mr. Mosher: I think so.

Examiner Gravelle: All right.

Does that complete your examination?

Mr. Garcia: That completes my examination.

Examiner Gravelle: I see it is almost the noon hour. Would you like to take the noon recess before you commence your cross-examination?

Mr. Mosher: I think it might be better, yes.

Examiner Gravelle: All right,

Mr. Mosher: Although I don't expect it to be long.

Examiner Gravelle: All right. Well, let's say— is 1:30 agreeable?

Mr. Mosher: Yes.

Mr. Garcia: Yes. I have very little, as I explained to the Examiner. My next witness will be simply demonstrative; very little.

Examiner Gravelle: All right. We will adjourn for the noon recess until 1:30.

(Whereupon at the hour of 11:56 a.m., a recess was taken until 1:30 p.m.)

* * * * *

AFTERNOON SESSION 1:30 P.M.

* * * * *

Examiner Gravelle: All right, this Commission hearing will be in order.

If I remember correctly, Mr. Hannigan was on the stand, and Mr. Garcia had completed his direct examination. And the witness, I assume, is available for cross-examination?

Mr. Garcia: That is correct, sir.

Examiner Gravelle: All right, Mr. Mosher, proceed.

Mr. Mosher: Yes.

JEROME B. HANNIGAN

CROSS-EXAMINATION

Mr. Mosher: Mr. Hannigan, would you outline again the nature of your duties for the Commission during the times that you testified?

The Witness: Yes.

I am an Associate Transportation Representative. My duties consist of calling on the various carriers that are subject to the Commission's jurisdiction, examining their records, analyzing their operations in an effort

to determine compliance with the Public Utilities Code, with the various tariffs, rules, regulations and general orders of the Commission.

Q. You, at numerous times, alluded to what has been referred to as the previous decision, the one involving, I think, Certified Transport? A. Yes.

Q. What particular interest did you have in that matter? It was concluded, wasn't it, at the time that you testified? A. What do you mean, what interest did I have in it?

Q. Well, I mean was that included among your duties, to follow up and see whether the order made in that proceeding was being complied with? A. It was in the nature of follow-up of that decision, yes.

Q. Had you been delegated that task of inquiring as to compliance with that order, specifically, or had— A. That was probably among the whole general assignment. I just received an assignment.

Q. From whom would such an assignment emanate? Who gives you assignments of that kind? A. Oh, from my supervisor.

Q. Had he, that supervisor, asked you to find out what the Certified Transport people were doing? A. Generally, yes.

Q. You were acquainted with the record in that case, weren't you? A. Yes.

Q. Or in that proceeding? A. To some extent, yes.

Q. Did you notice Mr. Green's name among the parties to the case —A. No, I didn't.

Q. —in any way? A. No.

Q. Was he a witness to it in any way? A. Not that I know of.

Q. When you called on him, did you go for the purpose of inquiring about Certified Transport? A. I had intended to tie that into my review, yes.

Q. Will you explain that remark a little further, "tie it in with your review"? A. Well, at the time I called on Mr. Green I, of course, didn't know what, if any, relation or connection, so, if there was some relationship or connection, I would endeavor to ascertain such a relationship.

Q. Well, now, when did you first go to see Mr. Green? A. It was March 12th, 1962.

Q. And, if I recall, you said that when you went there, you simply asked for his records, for the records of his trucking company; is that a correct statement? A. On my first visit, that is correct.

Q. Did you discuss Certified Transport matters with him at that time? A. Not at that time, no.

Q. You asked him for the records, I think you said; and he said that they were at his home, and his wife would give them to you? A. That is correct.

Q. In substance? A. In substance, yes.

Q. And you went to call at his home, then, to talk to his wife? A. That is correct.

Q. And when you went there were just the two of you there at the time that you talked to her? A. Just she and I. I believe there was a maid in the house at that time. I couldn't state positively that day or other days, because I was there on several occasions.

Q. When about did you first go out there? A. As I recall, it was in the afternoon of the 12th.

Q. The same day that you first went to see Mr. Green? A. Yes. That is the day I went to the home first.

Q. The afternoon of that day that you went to see Mrs. Green? A. Yes.

Q. Pursuant to the suggestion of Mr. Green that you did obtain records from her, is that correct? A. Records and any information.

Q. Oh, did he tell you that you could obtain other information from her? A. Well, anything I needed.

Q. Did you disclose to him what information you thought you might need? A. Oh, I think in a general way. I didn't know myself until I got into the records what was there. It was more or less in a general way; it had to be.

Q. Did you tell him at that time in substance that you were investigating the operations of the people who had been connected with Certified Transport? A. No, I did not, not at that time.

Q. Was this one of the matters that you wanted to talk to Mrs. Green about that day? A. If it was part of it, I would have, yes.

Q. Well, I don't understand your answer. "If it was part of it," now, what do you mean by that? A. If there was any relationship, I was going to establish it or try to establish any relationship, if there was such relationship between the Certified Transport and the Jim Green Trucking Company.

Q. Now, when you called on her, you had a conversation with her, at which no one else was present, just the two of you; and you asked her for the records, didn't you, for certain records? A. Yes.

O. What was there about the records that made you think that you were further interested in Certified Transport? A. Well, the records, the bills of lading showed the name Certified Transport on them. They

were clipped off in some places and scratched out, and the name Jim Green Trucking Company was inserted.

Q. And it was that circumstance that caused you to inquire further about Certified Transport? A. Yes.

Q. Then, you didn't go to her with the idea, I understand, of investigating Certified Transport, did you, or the people who had been connected with it? A. Not solely. You went to these with an open mind. You have to go into one of these things not knowing anything, really, and try to develop everything you can.

Q. In other words, you are just fishing, you were? A. You might say in starting an investigation, if you call that fishing, yes.

Q. But you didn't tell Mr. Green what you were fishing for, did you? A. I wasn't entirely sure at the time.

Q. Did you have some reason to think that you were interested in the operations of the people that had been connected with Certified Transport at the time you talked to him? A. In a general way, yes.

Q. The home to which you refer was the house where Mr. and Mrs. Green reside on Veronica Street, is that right? A. That is correct.

Q. Did it, any aspect of that edifice, look like an office to you? A. Yes.

Q. Would you describe, please, what—you described what kind of an office was maintained at the other place. Now, tell us what kind of office was maintained there? A. As you went to the home you went into a central hall. From the central hall you went to a large living room that had a large picture window. At the left of the living room is a small, I guess you would call it, alcove or end of the living room. It is actually part of the living

room, but it is narrower, it narrows down to one end, and in that alcove there was two or three filing cabinets, a desk, adding machine, typewriter and various paraphernalia that would be used in office type of work, paper work, billing, invoices, that type, and one thing and another.

Q. In fact, it looked like a place that could be put to use as an office for the operations of a trucking company; isn't that so? A. For any type of business, with filing cabinets, typewriters, adding machines used in any type of business, yes.

Q. In fact, it was just as much of an office as you found with the sign or the designation James Green, Jim Green's Trucking Company at the Lewis Food Company plant? A. It was apparent that it was used as an office, yes.

Q. Would you state—I withdraw that.

I believe you said that Mr. Green told you on that afternoon that she was a partner of Certified Transport? A. That is correct.

Q. Had you met Mrs. Green before? A. No.

Q. Isn't it a fact that that is all that she told you about Certified Transport,that she had been a partner of Certified Transport? A. No, that is not all. We had a discussion about the operation and the case and committees that were involved. We had more of a discussion than that one simple answer.

Q. Did she tell you that James Green Trucking Company was being operated in the same fashion as Certified Transport? A. Yes, she did.

Q. Did she elaborate on that statement at all or just make that general statement? A. She just made that statement in reply to my question as I was questioning.

Q. What were those questions? A. I asked her if the operations of Jim Green Trucking Company were any different from the operations of the Certified Transport. And she said that they were the same, with certain exceptions. And the exceptions were that the partnership of the Certified Transport, including an organization known as Orfit, had been dissolved.

Q. You know, in fact, that it was dissolved, don't you, that is, that there was no partnership at that time? A. To my knowledge it was; so far as I know, it was, yes.

Q. You also know that Mr. James Green was not a partner of or interested in Certified Transport, don't you? A. Yes.

Q. You also know that Mr. James Green was not a partner of or interested in Certified Transport, don't you? A. Yes.

Q. You had in front of you, which I later glanced at, some notes on yellow paper which you described two or three times, I believe, as your work notes? A. Yes.

Q. And later conceded that what you referred to as the summary page was not composed of entries made at the time of the transaction? A. That one sheet, yes.

Q. Yes.

Why did you prepare that sheet? A. Well—

Q. You did prepare it, didn't you? A. Yes. There were so many interviews and telephone conversations and dates and figures that I felt I had to; I couldn't rely on memory, if I had to go through the large file here, that I would have trouble finding it or —

Q. I see. A. It was simply as a simplification to me to know just what I was looking for.

Q. Then, you really didn't have a complete, clear recollection on these things at all, you— A. Oh, yes I did. I just wanted to be certain I could, at a moment's notice, refresh my memory if necessary.

Q. I see.

Were all of the other pages composed of entries you made at the time of the transactions to which those answers related? A. Immediately after such a transaction, yes.

Q. I would like to see those exhibits, please, or notes.

Examiner Gravelle: Exhibits?

Mr. Mosher: Or notes, rather.

(Documents handed to counsel)

Mr. Mosher: Your Honor, bear with me just a moment.

Examiner Gravelle: While Mr. Mosher is examining the notes of the witness, we will go off the record briefly.

(Off the record)

Examiner Gravelle: Back on the record.

Mr. Mosher: I want to see what this represents here.

Mr. Garcia: All right.

Mr. Mosher: Mr. Hannigan, I show you two pages of what purport to be your notes made at the time of various transactions; and those two pages, I assume, are consecutive, and that the first one—and you correct me if I am wrong—says, questioned Mr. James R. Green, on the first page.

Is this a review of your conversation with Mr. Green on the afternoon that you first called—

The Witness: May I see it?

Q. —on him and later, or the date that you first called on him and later in the afternoon? A. Yes,

these are the notes I made of the interview or conversation.

Q. This is a comprehensive narrative, is it? A. Well, no. It is somewhat abbreviated, actually. It gave me—after I left Mr. Green, I sat down and made these notes.

Q. It covers in substance, though, your complete conversation? A. Yes, I would say generally, yes.

Q. Now, would you please show me where your notes are to the effect that he told you to go and get any information you wanted from Mrs. Green? A. Well, I don't know that I put that down, because it wasn't necessary. I doubt that I even wrote such a thing.

Q. All right. I see. You keep them.

Following it up with one question, you didn't notice anything in those notes to the effect that Mr. Green told you to go and get any information you wished from Mrs. Green; there is nothing in those notes so indicating, is there? A. No—yes, I do have some work notes that show that.

Mr. Mosher: All right.

Do you want to see these, Mr. Garcia?

Mr. Garcia: No, I don't.

(Document handed to counsel)

Mr. Mosher: Yes, would you read that full entry?

The Witness: The date is shown as 3-12-62. The note says: Called at Lewis Food 817 East 18th Street, saw Mr. Green's records at 5165 Veronica. He called Mrs. Green. I went to that address.

Q. That concludes the entry? A. Yes.

Mr. Mosher: Thank you.

I don't think I have any further questions of Mr. Hannigan.

Examiner Gravelle: Any redirect, Mr. Garcia?

Mr. Garcia: Very few, Mr. Examiner.

REDIRECT EXAMINATION

Mr. Garcia: In response to Mr. Mosher's question, you indicated that you knew that Mr. Jim Green was not a partner nor interested in Certified Transport.

The Witness: Yes.

Q. Does that mean that you repudiate your testimony that he was employed by Certified? A. No.

Q. I see. Then, you don't repudiate that? A. No. He didn't have any interest.

Q. Other than as an employee? A. Other than as an employee.

Q. With respect to your notes, is it your custom to record everything verbatim? A. No, not verbatim, it would be too lengthy; just make sketchy notes really to refresh my memory.

Q. And how long have you been making this type of notes? A. Ever since I have been doing this type of work.

Q. And how long has that been again? A. 11 years.

Q. And the notes were simply to fresh your memory to other factors involved other than the entry itself? A. Yes.

Mr. Garcia: Thank you.

Examiner Gravelle: Any further questions, Mr. Mosher?

Mr. Mosher: No, nothing further.

Examiner Gravelle: Mr. Hannigan, in determining the fact that, or the statement made by Mr. Green, that he was an employee of Certified Transport, did you determine what he did for Certified Transport?

The Witness: Yes.

Q. And what were his duties? A. He did rating and billing, generally rating and billing; and as I recall, supervised somewhat—no, no, that was, the supervision came later with Jim Green. Rating and billing primarily. Those were the expressions I recall. He said his wife is doing that now.

Q. Do you know or did you determine whether Mr. Green was employed by Lewis Food Company at the time that he was working for Certified Transport? A. Well, I didn't determine if, other than Mr. Green did provide certain favors or services for Lewis Food, but not as an employee. He stated to my questions that he was not employed by Lewis Food nor did he receive any compensation.

Q. Now, when you are testifying there, you mean either in his connection with Jim Green Trucking or in his connection with Certified Transport? A. In either case.

Q. In either case, all right.

This office that was contained in Mr. Green's residence, in the course of your investigation did you determine who used that office? A. Yes.

Q. And who did use it? A. Mrs. Green.

Q. How did you determine that? A. Well, she explained her filing systems and her method of operating; and as I would ask for certain types of records she would explain where they were, where they were kept.

Q. Did you ask her directly who used the office? A. I did, because I seemed to be inconveniencing her working in the home, and I asked her if I was inconveniencing her: and at that time she said no, that she had nothing to do at the time.

The second day I went back I felt the same, and I did take the records the second day so she could get some work done at the desk.

Examiner Gravelle: All right.

Does that call to mind any further cross-examination?

Mr. Mosher: That doesn't, Your Honor; but I would ask your indulgence to ask something I overlooked about an exhibit which has been marked. And that is with the package which reflects any undercharges that might have been made, may I inquire about that?

Mr. Garcia: The notes, yes. You mean this, Mr. Mosher (indicating)?

Mr. Mosher: Yes.

Mr. Garcia: Do you want it?

Mr. Mosher: I don't want it here. But I just wanted Mr. Hannigan's experience on this.

May I, Your Honor?

Examiner Gravelle: Go right ahead.

Mr. Mosher: I'm a little out of point of order here.

Examiner Gravelle: That is all right. You go right ahead.

RECROSS-EXAMINATION

Mr. Mosher: You found no significant amount of improper charges, did you?

The Witness: No. There was nothing of any great importance on the undercharge basis, as far as the rating practices were concerned.

Q. And those undercharges, to the extent they do exist, could well have occurred in the course of routine operations, errors and mistakes— A. Yes.

Q. —and so forth? It would be normal to expect some deviation? A. Well, yes, I guess we all make some errors.

Q. Yes, but I mean there is nothing unusual about this amount of error, the amount involved in these errors, if they were errors? A. Well, that is kind of hard to say. Any error in the eyes, of course, of the Commission is a violation.

Q. Sure, and may be de minimis, maybe it doesn't mean anything to this Commission; but it seems to me with the volume of shipments which quite apparently were made that these are pretty small amounts of undercharges. A. Well, they would be, my opinion they are relatively small.

Q. That is what I am asking for, your experience of this. A. Yes.

Mr. Mosher: That's all I have, Your Honor.

Mr. Gravelle: That calls some further questioning on my part to mind.

At the time of your investigation am I to understand that the respondent operated a 1961 Chevrolet tractor?

The Witness: That is correct. He didn't operate it, he owned it.

Q. He owned it. And it was leased to Lewis Food Company? A. It was leased to Lewis Food Company.

Q. Now, hauling was done through Jim Green as a prime hauler through the use of subhaulers, is that correct? A. That is correct, yes.

Mr. Mosher: Noew, Your Honor, this is really one of the problems here—oh, Jim Green as a prime hauler, yes; excuse me.

Examiner Gravelle: Did your investigation disclose—or is this going to be covered by your next witness, Mr. Garcia—I will direct this to both of you, what the difference, if any difference was kept out of the payment to the subhaulers by the respondent?

Mr. Garcia: That will be covered in our next exhibit.

As I indicated, the undercharges here are de minimis, and our exhibit is really informational in that regard. It will set out the difference.

Examiner Gravelle: Any further questions of this witness?

Mr. Mosher: None, Your Honor.

Examiner Gravelle: All right, Mr. Hannigan, you may be excused.

Mr. Garcia: Do you have copies of this, Mr. Mosher?

Mr. Mosher: If that is the blue document that you sent me a copy of it, this is it?

Mr. Garcia: Yes.

Mr. Examiner, before I forget, I should like to offer in evidence Exhibits No. 1 and 2 and marked thus far for identification.

Examiner Gravelle: Any objection, Mr. Mosher, to the receipt of those exhibits?

Mr. Mosher: Let's see, 1 is the—

Mr. Garcia: (Indicating).

Mr. Mosher: Let's see what we have here. Oh, no, I have no objection.

Examiner Gravelle: How about Exhibit 2, do you have any objection to that?

Mr. Mosher: Exhibit 2 was—

Examiner Gravelle: Exhibit 2 is the photocopies of the documents taken from the files of your client.

Mr. Mosher: No, no objection.

Examiner Gravelle: All right. There being no objection, Exhibits 1 and 2 for identification will be received into evidence and bear the same numbers that they bore for identification.

Mr. Garcia: I would call Mr. John Burke to the stand.

At this time, Mr. Examiner, I should like to have the document entitled, "Summary of Certain Shipping Data Contained in the Records of James R. Green, dba Jim Green's Trucking Company," marked as the next exhibit in order.

Examiner Gravelle: All right, the blue-bound volume just described will be marked for identification as Exhibit No. 3.

Raise your right hand.

John C. Burke, called as a witness on behalf of the Commission staff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Examiner Gravelle: Be seated and state your name and business address, please.

The Witness: John C. Burke, Senior Transportation Rate Expert, California Public Utilities Commission, San Francisco, California.

Mr. Garcia: Pardon me, did you state by whom you were employed, Mr. Burke? By whom are you employed, Mr. Burke?

The Witness: California Public Utilities Commission.

Q. In what capacity and how long? A. Senior Transportation Rate Expert for 17 years.

Q. And did you have experience in the transportation industry in that capacity before coming to the Commission? A. Well, I have over 40 years of transportation experience both with railroads and industrial traffic management.

Q. Do you have before you the document marked No. 3 for identification, a copy thereof, I'm sorry? A. I do.

Q. Is this document the result of your analysis of the information transmitted to you by Mr. Hannigan in Exhibit No. 2, I believe it is? A. Yes.

Q. Do the parts herein conform to the parts marked numbered parts in Exhibit No. 2? A. They correspond with—

Q. Correspond, yes.

Then, very briefly then would you proceed to explain the exhibit before you. A. The exhibit, I believe, is more or less self-explanatory. It contains 13 parts numbered 1 to 13 inclusive.

Each part, as mentioned, corresponds with the corresponding parts in Exhibit No. 2, which contains the documents from which this, the information contained herein, was taken.

Following the parts in the exhibit we have an appendix which outlines the explanation of abbreviations and reference marks which we used, which I used throughout the exhibit.

Referring to Part 1 of the exhibit, the information on most of the front page down to and including the Rate and Charge Assessed was taken from the information and documents contained in Exhibit 2.

Below that I show what I determined to be the minimum rate and charge, on page 2 of Part 1; and those charges are carried forward on the lower part of page 1, which shows the total charges from page 2, the amount paid to the subhauler, and then the difference between the amount paid the subhauler and what I determined to be the minimum charge.

And basically throughout the exhibit that is true.

Q. Would you indicate just for information, the Examiner asked Mr. Hannigan the information about the difference in the amounts assessed by Jim Green

Trucking Company and the amount paid to subhauler. In how many parts is that difference reflected? A. The difference between the minimum and the amount paid to subhaulers?

Q. Between the amount assessed and amount paid to subhaulers. A. That shows throughout the exhibit. The difference is $2,937.15.

Q. For these 13 parts? A. That is for all 13 parts.

Q. Now, how many of these parts indicate undercharges? A. Six actually.

Q. Would you point them out, please? A. Part 1, charges assessed by the carrier was $507.21, as compared to $501.45 which I arrived at as the minimum charge, would be approximately $5.

Q. That would be an overcharge, would it not? A. That would be an overcharge.

Q. I was referring to just the undercharges. A. Oh, just the undercharges. Part 2, there would be a difference of 28—undercharge of $28.67, being the difference between that assessed by the carrier and what I determined to be the minimum rate.

Part 3 was insignificant, about 68 cents.

Now, Part 5 and 6 was consolidated to a degree by myself and then I—to the extent I used a recap sheet for both parts. This was actually two separate shipments, one covered by information contained in Part 5 and the information contained in Part 6 being a different shipment.

However, I recapped those, as you can see, and that was solely because, as I recall, the amount paid the subhauler was done under one or the other parts, and it had to be consolidated to come to total charges.

Q. I see. A. The difference between those two, of course, the total for the two would show an undercharge of $114.28 which, however, isn't really a true figure, in that Part 5 would have a considerable undercharge, not considerably, one hundred some dollars, approximately, whereas the portion on Part 6 would, the charge assessed by carrier would be slightly above, a couple dollars above the minimum.

And in Part 10 there was an undercharge of $136.19; and Part 11 was $250.64.

Q. All right.

Do you adopt this exhibit as your opinion? A. Oh, yes.

Mr. Garcia: I have nothing further, Mr. Examiner.

CROSS-EXAMINATION

Mr. Mosher: Do you have those undercharges—oh, excuse me.

Examiner Gravelle: Go ahead, that is all right.

Mr. Mosher: —those undercharges added up by any chance?

The Witness: I was just doing that—$530.46. That is combining the two parts, 5 and 6, together.

Mr. Mosher: I have no questions.

Examiner Gravelle: Mr. Burke, was there—could you determine if there was any specific amount deducted from the sum paid to subhauler by the respondent here, for instance, 10 percent off the charges or 15 percent or 5 percent off the charges?

The Witness: No.

Q. In other words, the undercharges or the difference, not the undercharge, the difference between the amount charged and amount paid to the subhaulers—A. What I should—

Q. —varied in different cases? A. Right.

Examiner Gravelle: Any further cross-examination, Mr. Mosher?

Mr. Mosher: No.

Examiner Gravelle: Any redirect?

Mr. Garcia: No.

Examiner Gravelle: All right, the witness may be excused.

Mr. Garcia: I offer this exhibit in evidence, Mr. Examiner. I believe that is No.—

Examiner Gravelle: 3.

Mr. Garcia: —3.

Examiner Gravelle: Any objection, Mr. Mosher?

Mr. Mosher: No objection, other than our general objection to all the evidence.

Examiner Gravelle: All right, Exhibit No. 3 will be received into evidence and bear the same number that it bore for identification.

Do you have any other witnesses, Mr. Garcia?

Mr. Garcia: None.

Examiner Gravelle: That concludes the staff's presentation, Mr. Examiner.

Examiner Gravelle: All right, Mr. Mosher.

Mr. Mosher: Mr. Green, please.

Examiner Gravelle: Will you raise your right hand.

James R. Green, a witness called on behalf of the Respondent, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Examiner Gravelle: Please be seated and give your name and address for the record.

The Witness: James R. Green, 5165 Veronica Street, Los Angeles.

Mr. Mosher: You are a citizen of Indiana or were born in Indiana?

The Witness: That is correct.

Q. And are a citizen of the United States? A. Correct.

Mr. Mosher: I think the shortest way of getting at this, you heard the testimony, if the Examiner has no objection, counsel has none, as to this form of procedure for you just to tell your connections with Lewis Food Company over the times which have been involved here, 1961 and '2 and into 1963. I think—

Mr. Garcia: I don't object to the narrative form of testimony, except that I do reserve might to object to what might be an unfounded conclusion or hearsay or anything of that nature, but not to him testifying in narrative without a direct question; I wouldn't object to that at all.

Examiner Gravelle: You certainly have a right to make a motion to strike or to stop the proceeding to make an objection.

The Witness: I am actually operating the trucking company. I believe it says Jim Green's Trucking Company. That is my position. With Lewis Food Company I do a certain amount of their shipping of canned animal feed or dry animal feed, either one, to different portions of California. In all probability 90 percent or 95 percent of it would be to Northern California. That is my sole connection, I mean as far as Lewis Food Company is concerned, of my business, transporting pet food to whatever destination that they so give me.

In regards to any other connections I have with Lewis Food Company, I do not have any personal connections with Lewis Food Company where I receive money or any other connections.

Examiner Gravelle: Does that complete your statement, Mr. Green?

The Witness: Yes.

Mr. Mosher: Well, then, I will continue here.

Would your answers be the same as to Mr. D. B. Lewis? A. I have no connection with Mr. D. B. Lewis in any manner.

Q. Mr. D. B. Lewis, though, to your knowledge, is a co-stockholder of Lewis Food Products? A. It is my understanding Lewis Food Company is a corporation and he is a stockholder and is President of the corporation.

Q. You have testified as to your present operations, trucking operations, for Lewis Food Company. Would you know of your own knowledge what percent of the total trucking business of Lewis Food Company is handled by you? A. I could give you a fairly close answer on that, I believe. I believe that I would know I wouldn't handle over at least 10 percent of their total shipments.

Q. Now, that percentage, what is the base for that percentage? A. The only base I can give, that actual figure would probably have to be answered by Lewis Food Company. I couldn't give you the actual amount, but I am basing it on the amount of shipments they do by their own trucks which I have a knowledge of, which are going every day, also by the Southern Pacific, Union Pacific and other leased trucking concerns that they have under lease.

Q. But you have in your own mind the monetary base and not a volume or weight or anything of that kind? A. Yes, correct.

Q. You are the husband of Mrs. Nell Lewis? A. Well, now—

Q. Or Green, I mean, formerly Lewis. A. That is correct.

Q. She was formerly known as Nell V. Lewis, is that correct? A. Yes, that was her former married name.

Q. And when were you and Mrs. Lewis married so that she became Mrs. Green? A. I believe that it was March the 4th, 1960. I hope that is the right date.

Examiner Gravelle: I hope it is the right date, too.

Mr. Mosher: She isn't here, unfortunately, or maybe fortunately.

Would you explain what connections, if any, you have had with Certified Transport? A. Yes. At the time my wife was the part owner of Certified Transport I did do some billing and some invoicing and other operations, procedure for the company. This was just right after I had left the Mayflower Transit Company which I was with for a number of years. And this was our income.

And so since I was her husband, I was very willing and capable of making out the billings for it.

Q. You were with Mayflower Transit Company? A. That is correct.

Q. Is that a Los Angeles concern? A. No, it is not a Los Angeles concern. I worked out of the home office in Indianapolis, Indiana, going around the country throughout the 48 states leasing equipment, talking to people that wanted to go into business, actually as what you might call as a subhaul lease, to operate their own equipment and handle the merchandise that Mayflower would be transporting anywhere in the United States.

Q. What caused you to get into the trucking business locally in Los Angeles? A. Locally, we had had this planned for sometime, my wife and I, I mean, to go into

to perhaps a bigger operation of trucking business and use my name. After all, also the fact I did not want to travel any more for Mayflower Transit Company and to create our own trucking company.

Q. Would you explain the method of your hauling or trucking operations for Lewis Food Company, if they can be reduced to a standard procedure. A. Well, actually, whatever hauls are offered to me as Jim Green's Trucking Company by Lewis Food Company are handled by my dispatcher who I have in an office at the Lewis Food Company premises, which I pay rent for this particular small office.

We, in turn, will contact other truckers on a subhaul basis, which I make out a lease with them to haul there for this particular amount of merchandise.

I use truckers that usually are based in Northern California that have delivered loads to this area. They, in turn, are looking for subhauls back to the other, to their home base, I should say, in Northern California; or otherwise they would have to return empty. I have used it on this basis.

Usually there are, I would say, 90 percent of the business I do on these particular subhauls are with independent truckers. We, in turn, of course, make out the shipping orders, do all the billing and all the necessary office work at my office at 5165 Veronica Street, in turn bill Lewis Food Company.

In general, I think that would fairly well cover it.

Q. Do you use a form of lease? A. Yes, I do.

Q. Printed form? A. It is a printed form. Actually it was submitted to the PUC at the time that we made the form out. I think they have seen it quite a number of times.

Q. It is a form commonly in use in this type of operation? A. As far as I know. I mean, it is a form that we had first; I forget which lawyer it was, but it was made up; we made sure it was legal and was entirely all right to use.

Q. It was presented to the Public Utilities Commission of this state? A. That is correct.

Q. For approval as to form? A. For approval as far as any approval they would give you.

Q. And that is what—you say it is a printed form? A. It is a printed form.

Mr. Mosher: Actually I have a copy of it somewhere, and I would like to produce it; but I don't know—oh, yes, here it is.

(Document shown to counsel)

Mr. Mosher: Your Honor, I have here what is marked "Sample" of one of these types of lease agreements to which I have referred; and I would like to ask the witness to look at it and perhaps have it marked.

Will you examine the document which I have just handed you entitled, "Jim Green's Trucking Co.," "Sample" written across the face, a printed document and letter-size.

The Witness: This is mine.

Mr. Mosher: Is this the—oh, may I have this marked—

Mr. Garcia: I have no objection.

Mr. Mosher: —for identification?

Examiner Gravelle: Certainly. Bring it forward here, Mr. Mosher, and I will mark it.

Mr. Mosher: Yes, it actually has counterparts there, but we might just, to keep from congesting the files, tear off the top page.

Examiner Gravelle: All right.

I have been handed a multipage document bearing the title, "Jim Green's Trucking Co., 5165 Veronica Street, Los Angeles 8, California, Lease Agreement." There are four pages on the document, three carbon copies. This will be marked for identification as Exhibit No. 4.

Mr. Mosher: The exhibit which you just examined, Mr. Green, is the type of lease agreement that you use in these leases for the trucks?

The Witness: This is the type of agreement I use with all subhaulers for each and every haul.

Q. And this is the type that was approved by the Commission? A. That is correct. As far as to my knowledge, yes, this was.

Examiner Gravelle: Let's take a 10 minute recess at this time.

(Recess taken)

Examiner Gravelle: All right, the Commission will be in order.

Mr. Mosher: Mr. Green, there was some evidence that you had been, or appeared to be, an employee of Lewis Food Company at sometime? A. Yes. I did survey work for Lewis Food Company. The exact date right at this moment, unfortunately, I can't give you. Approximately two to three months, I would say approximately those figures, I did some survey work for the sales department of Lewis Food Company. This was prior to —I know it was prior to November 1960.

I have had quite a large experience in sales analysis and in management; and for this I received pay from Lewis Food Company.

Is that the portion of it that you—

Mr. Mosher: Yes.

Examiner Gravelle: For my information, this was prior to what date?

The Witness: Prior to November of 1960.

Mr. Mosher: There was also evidence that you made some formal appearance at some proceeding apparently for the Lewis Food Company.

The Witness: Yes, I did.

Q. Will you explain that, please. A. I was, I believe this was in—I forget the exact date that this happened; I believe it was in August of—

Examiner Gravelle: I think it was August of 1961.

The Witness: 1961, I appeared and read a statement for the Lewis Food Company at the PUC hearing. I did this on my own accord.

I was going to San Francisco on business of my own, and I offered to read the statement, which I believe is in the record that I made the statement.

Mr. Mosher: Do you recall your conversation with Mr. Hannigan the day that he first approached you for information about the records, and so forth?

The Witness: The only think I can remember talking to Mr. Hannigan was I offered to give him any documents that he so desired pertaining to Jim Green's Trucking Company and told him that he could go out to my house where I had the office and pick up any documents that he so desired that was referring to, having anything to do with the PUC.

Q. Did you suggest that he discuss any other matters with Mrs. Lewis? A. No, I did not. I didn't know he was going to have any long discussion with Mrs. Green.

Q. I keep seeing Nell V. Lewis right in front of me here, which I am going to ask you about here in a minute.

Have you any knowledge apart from what he said today that Mrs. Green and he had any conversation about Certified Transport? A. I talked to Mrs. Green today at noon on the telephone, asking her if she had made a statement to him.

Mr. Garcia: I object to that as in the hearsay of Mrs. Green, unless she is produced. I don't mind Mrs. Green offering any of that testimony, but I would have her here.

Examiner Gravelle: Any reply, Mr. Mosher?

Mr. Mosher: No, I think probably his objection is well taken.

Examiner Gravelle: Well, I will sustain the objection.

Mr. Mosher: Off the record, Your Honor, and counsel.

Examiner Gravelle: Off the record.

(Off the record)

Examiner Gravelle: Back on the record.

Mr. Mosher: Looking at this Order, copy of which was served on you, Mr. Green, an Order Instituting Investigation in this matter, referring particularly to the numbered paragraphs on pages 2 and 3, do you have a copy of that document up there?

The Witness: Yes, I do have a copy.

Q. I would like very briefly to run over these questions with you and have you inform Mr. Gravelle what you have to say about it:

1. Whether respondent's operations constitute an instrumentality or device by means of which D. B. Lewis, Nell V. Green, formerly known as Nell V. Lewis, Lewis Food Company, and each of them are evading the Commission's order contained in Decision No. 61963.

Did you at that time have any intention of acting as an instrumentality by which, by means of which the order in that case was violated? A. No, I have no intention.

Q. As a matter of fact, do you know what the order provided for in that case? A Not exactly. I have seen the form that was sent to my wife; but I am not too familiar with it. I have nothing to do with having any device or any means of evading any Commission's order.

The only thing I am interested in is operating a business so I can make money. That is what I am in business for.

Q. Has that been a remunerative business for you? A. My own trucking company, you mean?

Q. Yes. A. Yes, it has been.

Q. Referring to paragraph 2 of that Order, the Commission wants to know whether—I am paraphrasing, whether respondent has violated Section 3667 of the Public Utilities Code by having directly or indirectly refunded or remitted in any manner or by any device any portion of the minimum rates or charges specified by Minimum Rate Tariff No. 2 and supplements thereto.

Have you, or James Green Trucking Company, directly or indirectly refunded or remitted any portion of the rates prescribed by that Rate Tariff No. 2 and supplements? A. I have never refunded or remitted in any amount to Lewis Food Company.

Q. Have you to anyone else? A. No, sir.

Q. Paragraph 3, whether respondent has violated Section 3668 of the Public Utilities Code by assisting, suffering, or permitting any corporation or person to obtain transportation for property at less than the minimum rates or charges prescribed in Minimum Rate Tariff No. 2 by means of any device.

Would you comment on that and answer it?

A. I think that refers back to the No. 2, the way I take it; but I mean I have never offered, had anything where I would charge less than the minimum rate of Tariff No. 2, which I operate underneath by, excluding any human error I might make by mistake.

Q. Well, in fact, have you ever—withdraw that. Have you charged Lewis Food Company, to the best of your knowledge and ability, minimum rates prescribed by this Commission? A. Yes, I always charge the minimum rate to the best of my ability.

Q. Have you ever by any form, means or device whatever refunded, rebated any portion of that— A. I have never refunded—

Q. —any rates to Lewis Food Company or D. B. Lewis or anyone to your knowledge, connected with the firm? A. I have never rebated or refunded any portion of the tariff rate to Mr. Lewis or Lewis Food Company or any other person connected with the Lewis Food Company.

Q. By the way, do you inow whether Lewis Food Company is or is not incorporated? A. Lewis Food Company is incorporated, to the best of my knowledge.

Q. Do you know what Mr. D. B. Lewis' connection with that company is?

Examiner Gravelle: I think we already have that testimony from this witness, Mr. Mosher.

Mr. Mosher: Well, very well, if that has been covered.

Examiner Gravelle: Was it before the recess we established that?

Mr. Mosher: We did mention it.

Examiner Gravelle: He was a stockholder and President of the company.

Mr. Mosher: Yes, that is right, I'm sorry.

Mr. Green, have you, referring to paragraph 4 here, the Commission wants to know whether you, whether the respondent is in fact operating as a motor transportation broker rather than as a highway carrier of property for compensation.

The Witness: I think that pehaps my permits answer that to a large extent. I have three permits granted to me by the PUC to operate as a prime carrier. I am not a broker. I do not have a broker's license.

Q. Well, have you ever purported or assumed to act as a broker? A. I have never operated or presumed to operate as a broker.

Q. Or, to your knowledge, have you ever acted as a motor transportation broker? A. To my knowledge I have never acted as a transportation broker, I mean what I call a broker; I don't know exactly the terminology, that of transportation broker.

Q. Paragraph 5, the Commission wants to know whether other carriers that you have purported to engage as underlying carriers or subhaulers were in fact performing transportation as prime carriers.

Would you comment on that.

A. Well, to my knowledge, they are operating as subhaulers only. My lease so states that while they are making a haul for me, they are operating underneath my permit, which is a permit as a prime contractor or hauler; and they are not at that particular time performing transportation as the prime carrier. I am the prime carrier at that particular time.

I believe this is a common practice with the transportation industry where there are quite a number of subhaulers.

To the best of my knowledge this is not against the law.

Q. What do you call a subhauler in your own thinking? A. A subhauler, in my own terminology, would be a trucker that could be operating as a prime carrier at different times, but a subhauler to me is a trucker that I have leased to make a haul for me that has been offered to me by Lewis Food Company. In most cases they are independent truckers, again, or truckers that would be going back to their bases without loads if they did not subhaul.

Q. And is it true that by subhauling, then, that provides an opportunity for them to make compensation which they otherwise would not make if they went back empty-handed? A. That is true.

Q. By the way, does Lewis Food Company contract out all of its shipments? A. No, sir. They have quite a fleet of trucks of their own. They do a lot of their shipments in their trucks that they have under lease by another trucking company called Dial Transportation Company, I believe, or Dial Trucking Company, that does hauling for them. That is underneath lease to them.

Q. Do you have any interest in it? A. I have no interest at all.

Q. I don't know whether there is a way this could be translated into a percentage, but if it can, I would like to know how much, approximately, of the hauling is done by Lewis in its own trucks as distinguished from what it places through concerns such as yours? A. I would say that, again, this is a question that properly would have to be answered by Lewis Food Company. I don't have access to this.

Making my own estimate, I would say that perhaps Lewis Food Company does approximately 50 percent of their own hauling.

Q. And of that amount James Green Trucking Company handles about not over 10 percent? A. I would say that is fairly close.

Q. In terms of money? A. Correct.

Q. Now, there was testimony that there was five hundred some dollars net after that consolidated, those consolidated items testified to that were undercharges. Do you know whether those undercharges existed? A. Not till this particular hearing.

Q. Do you have any reason to question the— A. The only thing I would say, I would question on it, I like a lot of small trucking concerns, have rate consultants; and these particular papers were delivered to this rate consultant who at that time notified me that he saw nothing wrong to any large degree on rates; and, of course, I took his word for it.

Going through the Minimum Rate Tariff No. 2 and all the, in all the ways you can figure rates, I think that anybody could make an error. I mean, I also have been notified by different people who have called on me by the PUC that our records and rates, the way we have been rating is considered very good. We can make errors. I think any human being can make an error.

Q. Well, then, you have no ground to question the testimony which was given that those appeared to be undercharges? A. I do not have any grounds.

Q. Now, if the Examiner or the Commission were to hold that there were underpayments, undercharges in the amount to which testimony has been given, would

you undertake to collect those rates from Lewis Food Company? A. I would be very happy to, if that is ordered, to collect the charges from them. I want it again to be on the record that I am in the business to make money, and the more I undercharge them, I would be very happy to pay my tax, in fact, the increase might help to pay my taxes.

Q. I started out to read these paragraphs. Some of them seem to be obviously insignificant in that they say, in effect, that you won't do anything unlawful, that —I am not going over them in detail; but at the same time I do want you to advise Mr. Gravelle as to anything that the Commission may be looking for as disclosed by this order. A. Well, actually, I don't know why I'm here, to be honest about it. As far as I am concerned I have done nothing unlawful, according to anything under the jurisdiction of the PUC, although I am willing to appear, I am willing to give any answers they so desire—I do not understand all these—and answer this subpoena; but I would be willing to answer any questions which go according to whatever directive they sent down for me, any undercharges they want them paid, I would be very happy to charge the shipper for them.

Q. I may or may not have covered this, but does Lewis Food Company have any interest in any shape or form in your trucking business, Jim Green's Trucking Company? A. Mr. Lewis has no interest of any type in my trucking company, which I believe has been also proven to the PUC field men.

Q. Has he ever had any interest, he or Lewis Food Company? A. Never had any interest in Jim Green's Trucking Company.

Q. By "interest" I mean a proprietary interest, not just an interest in seeing you do well or something of that kind. A. That is exactly what I am talking about, Mr. Mosher. They have no financial interest of any type in my operation.

Q. Who does have an interest in that operation? A. The only person that has an interest in it is myself. It is solely owned by myself.

Q. Now, there was some testimony about the ownership of trucks. Do you have any comments to make on that? A. Yes. There was, I believe, a document presented that at a certain date we showed we had no equipment. At the time that particular document was made up, I had sold one truck and had purchased another, was in the process of having a delivery. I do have a tractor which is in operation at the present time.

I believe you will find it is a GMC 1963 model. It is leased to Lewis Food Company.

Mr. Mosher: I don't think I have anything more to ask, Mr. Garcia.

Examiner Gravelle: The Witness is available for cross-examination?

Mr. Mosher: Yes, sir, Your Honor.

Examiner Gravelle: Go ahead, Mr. Garcia.

Mr. Garcia: All right.

CROSS-EXAMINATION

Mr. Garcia: I think you estimated that you handle approximately 10 percent of Lewis Food Company's trucking, shipping; is that what you stated?

The Witness: That is right.

Q. Isn't it a fact that quite a bit of the Lewis Food Company shipping is out of state? A. There is a certain amount out of state; yes, sir.

Q. As a matter of fact, a large amount, is that correct? A. I couldn't say exactly to this. I think this would have to be answered by Lewis Food Company.

Q. At any rate you do not have interstate commerce authority? A. That is correct.

Q. That would be one of the reasons you handle approximately 10 percent and not more? A. That is probably true.

Q. And, however, you handle only one shipper; isn't that correct? A. I only handle one shipper.

Q. And Lewis Food is the only shipper? A. Right.

Q. I believe you indicated that the last direct connection you had with Lewis Food Company commercially or otherwise was 1960, is that correct? A. Could you repeat that?

Q. The work, I think survey, you did for Lewis Food Company was approximately in 1960? A. That is when I was paid for the last work I did for Lewis Food Company.

Q. That is the last time they paid you? That is the last time you did any work for them? A. I have been a consultant on my free time.

Q. What do you mean by "free time"? A. I am not substantially busy 24 hours a day with the trucking concern. I have employees. And on my free time I have been a consultant to the Lewis Food Company, which I believe is my prerogative.

Q. I don't doubt that. What do you consult? A. Concerning sales. I have had a lot of experience in sales. I will be happy to explain this for you.

In Lewis Food Company, which I have some friends with, I am training, I have been training a person as a sales manager.

I went to Lewis Food Company and told them I thought I could increase their sales on a consulting basis with their company, which at the same time I felt like this would help my business, which I believe any person out looking for business has this right to do.

And I have given my service to, as a consultant, on that basis. I have written a few letters, which I will state to you, from the sales department, the issuing of bulletins for promotions.

This, in turn, I believe, has helped increase their sales, to a certain extent would increase my business. I have that much more shipments. I believe any transportation company is allowed to go out and increase their sales if they can.

Q. Then, the reason, one of the reasons for you assisting their sales department or consulting, as you say, was—had a connection with your transportation business? A. Would you repeat that?

Q. One of the reasons for your consulting with them was directly related to transportation; you wanted an increase in shipments, is that correct? A. No, I wouldn't admit it exactly on that basis. I felt like this might have—it was on my own offering, it wasn't asked to be done. There has been nobody come to Lewis Food Company and ask me to do this. I am interested in it. I have some free time; and so I have used it on that basis.

Q. Are you known as the Sales Manager of Lewis Food? A. I have no title as a sales manager of Lewis Company. Mistakenly there might be a few people that think on this basis. Lewis Food Company has an assistant sales manager.

Q. Who is the Assistant Sales Manager now? A. I believe at the present time it would be a Mr. Robert Hilton. These people are in training.

Q. You said, you indicated that you were training a sales manager. Was that your sales manager? A. Yes, I am helping him train, I mean I am helping, giving advice while he is in training as a sales manager.

Q. And how many hours a week does this comprise? A. It is hard to say. I spend a couple hours, two and one-half, three hours; another day, I mean it all depends.

Q. How about an average, 20, 25? A. Not over 20 hours within a week's time.

Q. And you do this on a friendly basis? A. Yes.

Q. For nothing, for no remuneration except for the interest in increasing your shipments? A. As far as pay I do not receive pay. If I have any expenses involved with this, I am rebated, refunded my expenses.

Q. Refunded your expenses? A. By Lewis Food Company.

Q. And what would those expenses entail? A. They would entail perhaps maybe traveling out of town. If I had to travel out of town, my expenses are paid for. They would be, if I had anything to do with any salesmen at Lewis Food Company that I might spend some money on, this is refunded to me.

Q. Does Lewis Food Company then supply you with an expense account? A. Yes, they do.

Q. They give you an expense account? A. For anything I spend only.

Q. For anything you spend. And is this submitted on a monthly or weekly basis? A. On a monthly basis.

Q. On a monthly basis. Have you submitted an account of this nature for the past 12 months? A. Yes.

Q. And how about the 12 months before that?

A. I would not say on a monthly basis at that time; I can't remember that.

Q. At any rate for the last 12 months? A. When I spent some money, I got some money back.

Examiner Gravelle: Let's take a brief recess for five minutes.

(Recess taken)

Examiner Gravelle: The Commission will be in order.

Proceed. Continue, Mr. Garcia.

Mr. Garcia: How often do you make a trip on behalf of Lewis Food Company? Once a month, twice a month?

The Witness: I would say I wouldn't make a trip over once every two or three months.

Q. Once every two or three months. What is the approximate duration? Is there an average? A. Not over a day to two days; not over two days at anytime.

Q. You testified that you have a, what is it, a new GMC? A. GMC.

Q. Is it a tractor? A. Tractor.

Q. And you have leased that to Lewis Food? A. Correct.

Q. That is not under your control or direction? A. No, it is under the control and direction of Lewis Food, which I leased it to them.

Q. So you still presently do not transport any property for compensation on your own equipment? A. Not on my own equipment. I am paid so much a mileage rate, of course, when I lease my own equipment.

Q. Have you registered that vehicle with the Commission? A. Oh, yes. I think I just got last month a new form to fill out.

Q. Oh, I see. In any event, you haven't sent it in, you intend to do so? A. It has been sent in.

Q. You presently have a subhaul bond on file? A. Yes, I do.

Q. You do? A. Yes. That is required by the PUC.

Q. I know.

I was under the impression you retained a subhaul bond recently. A. We retained one. We replaced it. It is a $5,000 bond. I believe that was the old bond; and it was replaced with another bonding company.

Q. Now, with regard to that sample agreement, subhaul agreement, I think it is the agreement you have with subhaulers; isn't that correct? A. That is correct.

Q. Isn't is a fact you acquired that form from Certified Transport? A. No, I believe you will find the Certified Transport's contract is a little different than this.

Q. Is it? I am just asking.

When did you adopt that particular form for your operation? A. This form was—well, in fact, it has had a change, I believe, from the original one. I can't state positively on this. Originally when I first went into business, this form or one very similar to it with maybe one or two changes on it was formed at that time.

Q. Now, you indicate that you didn't suggest that Mr. Hannigan discuss other matters with Mrs. Green; is that correct? A. That is absolutely correct.

Q. And you have absolute memory of everything that transpired at that occasion? A. I have as good a memory as Mr. Hannigan.

Q. Then, you are refuting, directly contradicting Mr. Hannigan's statement? A. If he made the state-

ment that I told him to get any other records except records pertaining to his position with the PUC, that is correct.

Q. Isn't it possible that your memory may have lapsed to some degree? A. I believe my memory is as good as Mr. Hannigan's.

Q. Did you make notes at the time? A. I probably did. I usually make some notes at the time that I go back to the house.

Q. Probably. Then, you don't know whether you made notes? A. I have no particular notes at this time, no.

Q. Do you recall when that date was? A. I believe it was in March, wasn't it? or June, I don't remember.

Q. I thought your memory was as good as Mr. Hannigan's. A. He had notes in front of him; I don't.

Q. Then, it is possible you might have forgotten something on that day? A. It is possible. I don't believe anybody has that good a memory.

Mr. Garcia: Fine.

I have no further questions, Mr. Examiner.

Examiner Gravelle: Do you have any redirect, Mr. Mosher?

Mr. Mosher: Just a few questions, Your Honor.

REDIRECT EXAMINATION

Mr. Mosher: Mr. Green, I think you testified that you have only one shipper whose work you handle?

The Witness: That is correct.

Q. Why is your work limited to performing services for that one shipper? A. At the present time I am, I mean with the subhaulers that I have available to me, this is all I can handle. I would be very happy, and I

have expected to expand my business if it is at all possible, if I could find other shippers that I can ship underneath the same basis.

I have done something very similar to this with Mayflower Trucking Company. I was very successful. I believe they are allowed to under the ICC. Not exactly the same, but very similar. That is the basis that I have created this company on.

Q. I understood you to say in substance and effect that your activities in promoting, in doing things for Lewis Food Company, in training Mr. Hilton, and so forth, were in the nature of promotional activities—you may not have used the term, but that was the idea—for your own business. In any event it was, you were doing something that you felt benefited your own business; is that right? A. That is correct. I felt like that in any way that I can promote my own business by promotions or whatever is allowed I would do, I mean, to promote more business for me, the happier I am.

Q. And to the extent that whatever you might have done to assist Lewis Food Company might promote your own business, there was a relationship, or is a relationship, between you and Lewis Food Company, I presume? A. On that basis, I would say yes.

Q. But it is still true that Lewis Food Company has no proprietary interest in James Green Trucking Company; is that true or not true? A. Lewis Food Company has no interest in my business at all. This can be substantiated by any income tax returns, which I believe the PUC has examined at certain times.

Q. Well, I would pursue that further by asking you again whether anybody else had any interest, and so forth; but we have been over that. But I would like to ask in the same connection whether you are related by

blood or marriage to Mr. D. B. Lewis? A. I am not related in any manner to Mr. D. B. Lewis.

Q. And is Mrs. Green related to him? A. She is not related to Mr. D. B. Lewis.

Q. You testified that you got a refund of expenses that you have incurred in doing things for Lewis Food Company from that company. Am I correct in stating that? A. Yes, this is correct. I believe I stated it, any expenses I was refunded by Lewis Food Company, that I did for Lewis Food Company, any service I did for Lewis Food Company was covered by expenses I paid for and was refunded by Lewis Food Company those expenses.

Q. Would you say that in each instance where you received a refund of expenses that you had incurred expenditures in an amount equal to those refunds? A. Yes.

Q. And those expense allowances, expense refunds, and so forth, that you mentioned were for services rendered actually for Lewis Food Company? A. That is correct.

Q. But not as a part of your trucking business? A. That is not a part of the trucking business.

Q. Was not a part of your trucking service? A. No, sir.

Q. Had no relation to it, did it? A. No.

Q. Mr. Green, you testified, and it has been established independently, that there were three permits here which you now hold. Are you familiar with the—just to save time, if I don't have to go through these and formally introduce them, you are familiar with the provisions of these permits? A. Yes, I am fairly familiar with them.

Q. And that they specify, each one of them specifies a number of conditions, such as that the vehicles shall be covered by public liability and property damage, and so forth? A. Right.

Q. Have you at all times, to the best of your knowledge and belief, complied with and kept each and all the terms and conditions of these three permits which have been referred to in this proceeding? A. Yes, to the best of my ability, I have.

Mr. Mosher: I think that's all of the questions I have from Mr. Green.

I do want to, at some point, offer Exhibit 4 for identification into evidence. That was the—

Examiner Gravelle: Why don't you offer it right now?

Mr. Mosher: Well, I shall. I offer Exhibit 4 for identification in evidence.

Examiner Gravelle: No objection?

Mr. Garcia: No.

Examiner Gravelle: No objection to the receipt of Exhibit 4 for identification, it will be received into evidence and bear the same number it bore for identification.

Any further cross-examination?

Mr. Mosher: One more thing, Your Honor.

Examiner Gravelle: Excuse me.

Mr. Mosher: I think I would like these permits by reference at least to be in evidence; and I think they are in evidence by reference.

Mr. Garcia: Yes.

Mr. Mosher: Very well. I have nothing further.

Examiner Gravelle: Any further cross-examination?

Mr. Garcia: Just one little question. I don't mean to prolong these proceedings.

RECROSS-EXAMINATION

Mr. Garcia: I just want to be clear in my own mind about the expense account. I notice you were very open and frank about it. Now, these expenses that you referred to, were they for buying a drink and things like that?

To rephrase my question, these expenses encompassed your board and lodging and entertaining other people on behalf of Lewis Food?

The Witness: Very little entertaining.

Q. But there was some? A. There was some. I mean most of the entertaining was by Lewis Food while the Lewis Food Company was along, while I was giving him my advice at the same time.

Q. But, in any event, the money came out of your pocket? A. If any came out of my pocket, I was reimbursed by Lewis Food Company. I turned in receipts the same as anybody else would.

Q. How about mileage? A. Mileage, no.

Q. No mileage? A. I fly into most places.

Q. And car rental? A. If there is any car rentals, those were turned in.

Q. Taxicabs? A. Taxicabs. Normal expenses that would be any other type.

Q. How many hours a week would you spend in your transportation business? A. That is hard to say if you can count to midnight at night sometimes. I would say at least 40 hours; I couldn't say that exactly. I guess I would say more like 35 hours of this, because as consulting with my wife, going over things in my own office, supervision with my dispatcher, I am continuously supervising that at Lewis Food Company.

Q. Some of this type would be in your office and in your home? A. That is correct.

Q. At odd hours? A. A portion of it down there as shipping goes on. It is hard to say. I would be talking to my subhaulers at different companies.

Mr. Garcia: I have nothing further, Mr. Examiner.

Mr. Mosher: Then, I have one more.

REDIRECT EXAMINATION

Mr. Mosher: And that is why did you maintain an office at Lewis Food Company?

The Witness: We maintain—

Q. Or why do you maintain it? A. We maintain an office down there because much of the shipping comes from the warehouse of Lewis Food Company, and it is where we can have it underneath direct supervision there. And I pay for this office space there. It is for myself and dispatcher both.

Mr. Mosher: I have no further questions.

Mr. Garcia: Do you have a copy of this, Mr. Examiner (indicating)?

Examiner Gravelle: That is in the file.

You gentlemen are through for the moment?

Mr. Mosher: Yes. The respondent rests.

Examiner Gravelle: Mr. Green, you testified that you worked for Mayflower Transit?

The Witness: Yes, sir.

Q. Prior to being employed by Certified Transport; is that correct? A. That is correct. When you say "employed by Certified," I really don't know what you mean by that. Actually my wife owned the business. I helped her out. We both received the money. She was a partner. She received a partnership part of the profit. This was our income. However, I was married to her.

This was considered income of both of us. I did work with Mayflower Transit Company before that.

Q. Was that immediately prior to—put it this way—your connection with Certified Transport, whatever relationship it was, you worked for Mayflower Transit immediately prior to that? A. Yes.

Q. And that job involved salesmanship to a large extent? A. To some extent and also leasing of the equipment. I mean I checked the equipment out that the person owned.

Q. Did it involve any such thing as rating, for instance, or actually performing a transportation service? A. Not just prior to that. Before that, yes. I mean I had experience with the company in all departments, I mean in rating and dispatching. We went through quite —to become management in Mayflower Transit, you would go through a certain series of all phases of their operation.

Q. How long did you work for Mayflower Transit? A. I would say approximately six to seven years, to the best of my knowledge.

Q. Now, you testified that you pay rent for the Jim Green office, which I think Mr. Hannigan testified has a sign over the door? A. Yes.

Q. At the Lewis Food Company plant? A. Right.

Q. How much rent do you pay for that office? A. I pay $30 a month.

Q. There was also some testimony, which I assume you heard, from Mr. Hannigan that you maintained an office in another part of the Lewis Food Company plant. Is that true? A. I don't maintain an office. I have desk space up there, yes, I mean to use. As I

stated before, that where I am giving advice or consulting, whatever you want to call it, I mean to these particular people up there, and I have desk space up there, I want to use it.

Q. Where is that located? A. That is located on their main floor where all their offices are.

Q. Well, is it— A. It is one office.

Q. Is it in the sales department? A. Sales is there, billing is there; it is all combined in one big office.

Q. Do you have a telephone in the Jim Green Trucking Company office listed under your name? A. It is not listed on all my correspondence. I believe you will find there are two telephones, my telephone at home and also RIchmond 9-5105, which is one of the telephone numbers that is underneath Lewis Food Company. I believe they have four numbers. The telephone is usually answered RIchmond 9-5105, and if they want Jim Green's Trucking Company, it is automatically given to me or to my dispatcher by the exchange.

Q. On Exhibit No. 4 is the number AXminster 3-5803. What is that? A. That is the number at my home. It has been changed, sir. It is now AXminster 3-0080.

Q. You testified that the form, Exhibit No. 4 here, has been submitted to the Public Utilities Commission. Could I have given to me a little more background on that. When was it submitted to the Public Utilities Commission? A. If I remember correctly, when I was granted my permits, we were called upon by the PUC. What field man it was, I can't remember. He asked to see the forms we were going to use. Anyhow, if I remember correctly, we sent a copy in to the PUC. We had to show where we used our numbers there that

they had granted me. I can't be definite on this. I do know the field man saw them. I do know that.

Q. When you say "approved by the PUC," what you are thinking about is the representative? A. The representative of the PUC had approved, correct.

Q. And your testimony is that this occurred sometime in 1960, when you activated your permits? A. I believe it would '61, if I am correct, sir.

Q. '61. The permits were issued in 1960? A. Issued in 1960, reactivated in 1961.

Q. What did you do between, in the period between the issuance of the permits and the activation of the permits on October 10th, 1961? A. I was helping my wife out with the business that she was running at that time. Also I did do some public relations work on my own with some other people, mostly, the biggest majority was helping her out in the billing and office part of the other company.

Q. Now, you testified that you, or I got the impression from your testimony that when you testified in Case 5330 on behalf of Lewis Food Company that you did that as a favor? A. Well, I have never used —the term "favor" is pretty loosely arranged; but I was going to San Francisco, and I offered my services to read this statement that they were going to read anyway.

And at that time before the Examiner I offered it to him not to even read. I said this is a statement while I am up here attending the hearing that the Lewis Food Company would like to present to be in the record. And he says the only way that this can be done is for you to make the statement and read it yourself, and which I did do.

Q. Well, you testified repeatedly here that there is no proprietary relationship between D. B. Lewis or Lewis Food Company or Jim Green Trucking Company. A. That is correct.

Q. Do you have a friendly relationship with Mr. Lewis? A. I have known Mr. Lewis for seven or eight years; and I consider him a friend of mine, yes.

Q. You also testified that Robert Hilton is the Assistant Sales Manager for Lewis, is that correct? A. That is correct.

Q. Who is the sales manager? A. At the present time the sales manager has not been given a title to this effect. He is in training to perhaps become the sales manager. There have been two of them that have had training. I don't know which one, I couldn't tell which one would even be named sales manager. I do know they are in training to become the sales manager.

Q. This "assistant" to my mind means assistant to something. And this is what I am trying to get at.

There is no, your testimony is there is no person presently filling the position of the sales manager? A. I would say in all probability, if you want to have the person filling the position of sales manager, would be Mr. D. B. Lewis, who is the President of the company.

Q. Jim Green Trucking Company is a sole proprietorship; you have testified to that. A. Sole Proprietorship, that is correct.

Q. How many employees do you have? A. I actually have one that is on my payroll. My wife does it, too; but being it is all my money, I don't pay her a direct salary, because we, our income tax returns are made as together.

Q. You do file a joint tax return? A. We do file joint tax returns.

Examiner Gravelle: I don't believe I have any other questions.

Does that bring any further questions on the part of counsel?

Mr. Garcia: None, Mr. Examiner.

Mr. Mosher: No, I have no more, Your Honor.

Examiner Gravelle: All right.

Is there anything further to come before us at this time?

Mr. Garcia: Do we have the matter of the continuance on the record?

Examiner Gravelle: No, I don't think so.

All right, this matter will be continued, pursuant to conversations held previously between the Examiner and counsel, to March 25, 1964, at 10:00 a.m., in Los Angeles for the purpose of presenting oral argument at that time.

If there is nothing more to come before us today, we will stand—

Mr. Mosher: One question, Your Honor.

That is for the sole purpose of argument? We are not to bring in any more witnesses if we think of anything?

Examiner Gravelle: No, this, my understanding, this is just for argument.

Mr. Mosher: Very well. That is satisfactory to the respondent.

Examiner Gravelle: All right, if there is nothing further to come before us at this time, this matter will

be continued to March 24th—March 25th, 1964, in Los Angeles.

Mr. Mosher: At 10:00 o'clock?

Examiner Gravelle: At 10:00 o'clock.

And the Commission stands adjourned.

(Whereupon, at the hour of 3:50 p.m., this matter having been continued to 10:00 a.m., March 25, 1964, in Los Angeles, California, for Oral Argument, the Commission then adjourned)

* * * * *

APPENDIX E.

Office of the Clerk Supreme Court of California, William I. Sullivan, Clerk.

San Francisco, California
November 19, 1965

Messrs. Gaston, Keltner & Adair
Attorneys at Law
811 West Seventh Street
Los Angeles, California

Re: S.F. 21994—Green v. P.U.C.

Gentlemen:

Enclosed herewith please find certified copy of the complete record before this court in the above proceeding, consisting of the following:

1. Petition for Writ of Review, filed March 5, 1965;
2. Answer to petition, filed April 9, 1965;
3. Petitioner's reply to answer, filed July 9, 1965;
4. Order denying petition, filed July 28, 1965;
5. Motion for stay of execution, filed September 30, 1965;
6. Opposition to motion, filed October 6, 1965;
7. Order denying stay of execution, filed October 28, 1965.

In addition to the foregoing matters, your Designation of Record tendered to us included documents that may have been before the Public Utilities Commission when the proceeding was there pending but were not produced in or made a part of the record of this court.

Under the circumstances, we cannot certify to the latter documents. We are therefore returning herewith copies of the first two items specified in your Designation of Record inasmuch as they were not before this court. In the meantime this matter has been discussed by my deputies with Miss Wilson of your office.

Enclosed also is statement of charges for certifying the record.

Very truly yours,

/s/ William I. Sullivan
William I. Sullivan
Clerk of the Supreme Court

WIS:hm
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JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 775 & 945

JAMES R. GREEN, doing business as JIM GREEN'S TRUCKING COMPANY,
Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Respondent.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 775 & 945

JAMES R. GREEN, doing business as JIM GREEN'S TRUCKING COMPANY,
Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Respondent.

Brief for Respondent in Opposition

OPINIONS BELOW

On July 28, 1965, without opinion, the Supreme Court of California denied petitioner's petition for writ of review of the California Public Utilities Commission's decision entered October 6, 1964, Decision No. 67998, reported at 63 Cal. P.U.C. 425.

JURISDICTION

The jurisdictional requirements are adequately set forth in the petition.

QUESTIONS PRESENTED

The Public Utilities Commission of the State of California (Commission) respectfully submits that, more ap-

propriately stated than in the petition herein, the questions presented are:

1. Is petitioner's Fifth Amendment privilege against self-incrimination controverted by the order here under review, requiring petitioner to review his records to determine whether he has charged the applicable lawful minimum rate and to institute proceedings to collect such rate if his records reveal he has not done so in a specified period in the past and to report the results to the Commission?
2. Does the Commission imposed restriction of petitioner's permits, which requires he pay minimum rates to all carriers he may hire in the future to transport the property of his only shipper (Lewis Food Company), who receives the benefit of petitioner's gratuitous services, violate petitioner's Fourteenth Amendment guarantees of due process and equal protection?
3. Under 28 U.S. Code Section 1651(a) does this Court have jurisdiction to issue a common law writ of certiorari to the California Public Utilities Commission directing it to certify to the Court that portion of the record of this case not certified to the California Supreme Court by said Commission as a result of the state court denying petitioner a Writ of Review?

STATUTES INVOLVED

Pertinent provisions of the Public Utilities Code of the State of California (Sections 3664, 3666, 3667, 3668, 3774, and 3800) are set out in full in the Petition herein (pp. 4, 5, 6, of Appendix to Petition). Other pertinent provisions of the Public Utilities Code relevant to the instant case,

which have not been cited by petitioner and reproduced in his Appendix to his Petition, are §§ 1732, 3801, 3572, and 3662, and appear in full in Respondent's Appendix at page 1, et seq.

STATEMENT

While the facts of this case are set forth fully in the Commission's decision, appearing in petitioner's Appendix,[1] a brief explanation appears in order to clarify omissions and distortions presented by petitioner's statement. Shorn of all surplusage, the facts which have never been in dispute between the parties are simple. Petitioner is a permitted carrier coming under the jurisdiction of the Commission whose permits were issued to him at a time when his employer (Certified Transport) and his wife were parties in a proceeding before the Commission which terminated in revocation of the employer's permits for allowing its only shipper, Lewis Food Co., to obtain transportation of its property for less than the minimum rates in violation of Section 3667 of the Public Utilities Code.[2] During the pendency of that prior proceeding, petitioner requested his newly issued permits be suspended.[3] Six days after the California Supreme Court upheld the Commission's revocation of his employer's permits,[4] petitioner activated his permits, ceased his employee relationship and commenced serving the same shipper in the same manner as had his former employer, using the same method (subhaulers exclusively) and the same physical plant.[5] His wife, as his employee, took over the duties he had performed for his former employer.

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1. Appendix B, page 8.
2. Page 4, Pet. App.
3. Page 10, Pet. App.
4. Page 11, Pet. App.
5. Page 11, Pet. App.

From the time he commenced operating as a permit carrier until the Commission's investigation which began this proceeding, he operated as a sole proprietor, doing business as the Jim Green Trucking Company, serving only one shipper, Lewis Food Company, through the method of hiring subhaulers who did the actual transporting of the shipper's property at a negotiated rate less than the applicable minimum rate. He allegedly charged the shipper the applicable minimum rate with the exception of specific shipments made the subject of the undercharge penalty in the instant case. These undercharges, totaling $530.46 as evidenced by the record, were never disputed by petitioner. Also a fact not disputed by petitioner was his donation to the shipper of his services for about 20 hours each week.[6] His sole income as the Jim Green Trucking Company consists of the difference between the minimum rate paid to him by Lewis Food Company and the amount he was able to negotiate with subhaulers who performed the actual transportation. Petitioner's involved statement in his petition neither adds nor substracts from these basic facts which were not disputed by him. Rather, he disputes what consequences may or should flow from these facts.

Respondent respectfully draws the Court's attention to the fact that the Commission staff counsel's brief appearing at page 10, Appendix C, of Petitioner's Appendix, together with the entire reporter's transcript of the one-day hearing, reproduced as Appendix D beginning at page 20 of petitioner's Appendix, were documents not before the State Supreme Court and therefore should not be considered by this Court.[7] Respondent would also direct the Court's attention to Petitioner's Petition for Writ of Review, made a part of this record, filed with the California Supreme Court

6. Page 110, Pet. App.

7. *Ciucci v. Illinois*, per curiam, 356 U.S. 571 at 573.

wherein petitioner could have but failed to reproduce any portion of said transcript and/or brief. He had every opportunity to do so if he had thought such documents relevant to his appeal in that court. In fact, petitioner failed to reproduce the Commission decision and order under attack in his state court brief or his Petition for Rehearing filed with respondent Commission, both documents essential in this case to his appeal to the California Supreme Court, as they were unavailable to that court in any other manner. As a service to that court and to insure that petitioner would receive a fair hearing in his appeal there, respondent reproduced both documents in its Answer.[8] It should be noted that § 1756 of the California Public Utilities Code[9] expressly provides that the Commission shall certify its record of a case to the California Supreme Court upon the granting by that court of a petition for a writ of certiorari or review, (unlike this Court's Rule No. 21(4)). However, nothing in the Code or in the court's rules on appeal precludes a petitioner from including in the Appendix of his original petition any part of the record made before the California Commission so as to assure its consideration by the California Supreme Court and its inclusion in the record on appeal in the event the petition for writ is denied.

Contrary to fact, petitioner asserts that he raised his federal constitutional objections to the Commission's actions at the earliest possible time therefore preserving them for review.[10] He quotes the Commission decision as proof of this statement.[11] He continues by stating:

> "In that petition (Petition for Rehearing before the Commission appearing in the Commission's Answer,

8. Resp. Answer, App.
9. Page 2, Pet. App.
10. Page 15, Pet.
11. Page 15, Pet., see also p. 14, Pet. App.

in its Appendix at page 15, et seq.) he raised every objection to the opinion and order which he now seeks to assert before this Court." (p. 15, Pet.)

This Court's Rule 23(1)(f) requires that a petitioner must present proof within his petition that his federal question was timely raised, and if he fails to do so, his petition may be denied[12] (Rule 23(4), 28 U.S.C.A. Supreme Court Rules). A study of the record presently before this Court together with Petitioner's petition fails to reveal any support for petitioner's assertion that he raised his federal questions in a timely manner. In his Petition for Rehearing before the Commission, the document that properly should contain such allegations,[13] petitioner claimed generally that

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12. In his brief submitted at the close of the hearing in this proceeding and which is conspicuously omitted in his Appendix while the Commission staff counsel's brief is reproduced, petitioner presented his "constitutional" objections to the Commission in the following manner:

> "To the extent that the proposed action would depend for its support upon the order in Decision No. 61963, it would *plainly be unconstitutional.* Respondent was not a party to the proceedings in which such order was made, and the order did not in terms apply to him; and to the extent that the proposed action would rest solely upon evidence introduced at the hearing of this proceeding, it lacks the support of substantial and legally competent evidence, and would amount to depriving respondent of valuable property and rights, *in violation of the constitutional provisions above cited.* In this connection it may be noted that respondent testified, and the testimony was not disputed, that his trucking business was remunerative (Tr. 94)." (Emphasis added).

This was all petitioner said of his constitutional rights in that brief. The Commission's one sentence in its opinion that "We do not feel that his [petitioner's] constitutional rights are hereby impaired in any way." was in response to this general assertion.

13. PUC § 1732 appearing in Resp. App. at 1.

his *state* constitutional rights had been abridged; i.e., (a) a fair hearing, (b) protection from unreasonable search and seizure, (c) self-incrimination by way of coerced confession, (d) no substantial evidence so substantive due process denied.[14] The specific constitutional grounds urged by petitioner before the California Supreme Court were raised for the first time before that court and therefore not properly before it for review.[15] Petitioner's claim that his Federal Fifth Amendment right against self-incrimination is abridged by the Commission's order is being urged for the first time before this Court.[16]

While the Commission asserts that petitioner's federal constitutional objections herein presented were not timely raised, and therefore should not be considered, thereby requiring a denial of petitioner's Petition for Certiorari without reaching the merits,[17] should this Court consider them, respondent urges they are insufficient for the following reasons.

ARGUMENT

I. Petitioner's Fifth Amendment Right Against Self-Incrimination Not Abridged.

Petitioner bases his claim that his constitutionally protected right against self-incrimination will be violated by the Commission's order on a basic false assumption that any past undercharges discovered by him after a search of his

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14. Comm. Answer, App. p. 15, et seq.

15. Comm. Answer p. 12, et seq., see also *Ferguson v. Georgia*, 365 U.S. 570, 572.

16. The only reference petitioner ever made in his prior pleadings before the Commission and the California Supreme Court was to the California Constitution, Article I, § 13, in connection with the privilege against self-incrimination (see Pet. for Rehearing in Comm. Answer, Appendix 29, and petitioner's Petition for Writ of Review before the California Supreme Court, p. 41).

17. See *New York Central & R. R. Co. v. New York*, 186 U.S. 269, 273; *New York ex rel Bryant v. Zimmerman*, 278 U.S. 63, 67-8.

records *could* be the basis of a criminal prosecution against him even though he is also ordered to collect such undercharges as he may discover.[18] In order to invoke the privilege against self-incrimination, one must be in a position to incriminate himself. Petitioner's authority makes it abundantly clear that the privilege relates to *criminal* prosecutions only. The court pointed out in *Malloy v. Hogan,* 378 U.S. 1 at page 8 (1964):[19]

> "Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion *prove a charge against an accused* out of his own mouth." (Emphasis added)

Respondent does not question that the privilege against self-incrimination is one of the fundamental rights of an accused in a criminal prosecution. The short answer to petitioner's objection here is that all the Commission has ordered him to do is to remove himself from any possible future charge against him, whatever its nature, in connection with his past performance in relationship to the minimum rate tariff. If a search of his records reveals that he has in fact charged his only shipper less than the minimum rate in any instance not revealed by the Commission staff's perusal of his records, he is to collect the correct amount. Once having done that in obedience to the Commission's order, he could never be charged with any misconduct by the Commission or any other forum in connection with such undercharges.[20] Thus, no injurious disclosure could possibly result from his compliance with the instant order.[21]

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18. Page 15 Pet. App.

19. See also *State v. Rixon* (1930) 231 N.W. 217, 68 A.L.R. 1501, and cases collected in 68 A.L.R. 1503.

20. Public Utilities Code, § 3664 at page 4, Pet. App.

21. *Hoffman v. U. S.,* 341 U.S. 479 at 487.

To translate this simple directive into a violation of his federally protected privilege against self-incrimination, petitioner has distorted the entire extent and purpose of the Commission's order. As an established and well-tried policy in protecting the structure of its minimum rate regulations, the Commission has made such orders repeatedly.[22] Hence, shippers who may have obtained transportation of their property at less than minimum rates in past transactions with permitted carriers are required to ultimately pay the lawful rate through this procedure thereby giving effect to the intent of this highly remedial statute. If such an order is not obeyed by a carrier, the Commission may subject it to punishment by contempt.[23] In no way can such an order itself be classified as punishment as the permit carrier is ordered to obtain a benefit; i.e., additional money from the shipper. The California legislature recognized the basic characteristic of such a procedure and in 1963 amended the Public Utilities Code § 3800[24] to permit the Commission to levy a fine equal to the amount of undercharges it (the Commission) had proved at hearing, so that a carrier found to have charged less than the lawful rate by the Commission would not be unjustly enriched by the collection of such past undercharges and could be punished for infractions of the Code. By the very wording of this 1963 amendment, petitioner could not be fined for any undercharges he might discover after a search of his records as the fine is allowed only after the Commission, "after a hearing", finds such undercharges.[25]

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22. Page 16, Respondent's Answer in California Supreme Court wherein statistics as to Commission's enforcement program in fiscal year 1962-63 listed $126,740.11 collected as undercharges through 410 informal proceedings.

23. *Coast Trucking,* (1964) 61 Calif. PUC 778.

24. Reproduced at page 6 in Pet. App.

25. PUC § 3800 at p. 6, Pet. App.

A search of the Public Utilities Code sections reveals no provision wherein petitioner could be punished in any manner for discovering and collecting past undercharges. Neither does petitioner cite any. Section 3801 of California's Public Utilities Code, not reproduced by petitioner, is the only section which might have any relevance.[26] It provides for a fine or jail sentence if a permit carrier (1) violates any provision of Chapter 2 of the Code, or (2) aids or abets another to do so, or (3) who fails to comply with any Commission order. Such unlawful conduct is classified as a misdemeanor; hence, it requires a criminal prosecution and California's one year statute of limitations applies.[27] No such prosecution could take place against petitioner as a result of obeying the Commission's order in the instant case as he would have expressly obeyed all provisions of Chapter 2 of the Code, however belatedly. In passing it should be noted that even were this not so, the one-year statute of limitations has long run against any undercharges petitioner might discover for the years prior to the commencement of this proceeding.

Nowhere in his petition does petitioner cite any authority to support his allegation at page 21 of his petition that to obey the Commission's order he would possibly be furnishing evidence to convict himself of a misdemeanor some time in the future. His entire argument on this issue flows from an unsupported assumption that to discover and disclose past undercharges he would be admitting infractions of the law which are criminally punishable.[28] No Commission proceeding is a criminal proceeding. It is beyond question that it is within the competence of the legislature to confer upon

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26. Page 2, Resp. App.
27. Penal Code § 801.
28. Page 19, Pet. Pet.

respondent Commission functions of a judicial nature which include the imposition of a monetary penalty,[29] but this does not transform Commission proceedings into criminal actions. California's Supreme Court has so held in *William E. Stringfellow v. Public Utilities Commission.*[30] In that case, petitioner, also a permit carrier, subjected to the same kind of Comimssion investigation directed against petitioner here, urged that he had a right to a jury trial on the theory that the Commission procedure was criminal in nature. The California Supreme Court's denial of a writ is equal to a decision on the merits.[31] This holding is in accord with authority in other jurisdictions.[32]

As petitioner cannot subject himself to criminal prosecution through obeying the Commission's order in this case, and as petitioner's own authority makes it clear that the privilege against self-incrimination relates only to possible criminal proceedings which might result against one asserting the privilege,[33] his claim that the instant order violates his Fifth Amendment right against self-incrimination must fall.

II. Petitioner's Fourteenth Amendment Guarantees of Due Process and Equal Protection Not Abridged.

Petitioner centers his claim of denial of due process and equal protection around respondent Commission's ordering paragraph #7[34] which limited his permits to require that

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29. *Helvering v. Mitchell* (1938) 303 U.S. 391.

30. 62 Cal. P.U.C. 595, S.F. No. 21738, writ denied November 4, 1964.

31. *People v. Western Air Lines, Inc.* (1954) 42 C.2d 621 at 630, app. denied 348 U.S. 859.

32. *Wycoff Co. v. Pub. Serv. Comm.* (1962) 13 Utah 2d 123, 369 P. 2d 283, 43 PUR 3d 288.

33. *Malloy v. Hogan,* 378 U.S. 1 (1964); *Communist Party v. Subversive Activities Control Board,* 367 U.S. 1 (1961).

34. Page 12, Pet. App.

he pay carriers no less than the applicable minimum rates established by the Commission when he engages such carriers "in connection with the transportation of property for Lewis Food Company or its customers or suppliers." The Commission, in so limiting petitioner's permits, was acting under the authority of the California Public Utilities Code, section 3572, which provides in part that:

> "The Commission may attach to the permit such terms and conditions as, in its judgment, are required to assure protection to persons utilizing the operations."

The class of individuals who are protected by such a limiting condition are shippers who rely upon the integrity of the Commission's Minimum Rate structure established under the authority of section 3662 of the Code.[35] Even without such restriction, so long as petitioner's relationship with Lewis Food remains the same, as disclosed at the hearing in this proceeding, he would be under such a duty. The limitation in his permit is in reality only a memorandum to put petitioner on continual notice that his voluntary services to his shipper equal a "device" prohibited by section 3668 of the California Public Utilities Code.

It is generally conceded that the nature of the operating authority granted petitioner by this Commission is a privilege, not a right, and as such may be limited or revoked within the limits of due process.[36] Under the authority of

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35. See Resp. App. pp. 1, 2.

36. *Sale v. Railroad*, 15 Cal. 2d 612 (1940).
Not until now has petitioner attempted to claim denial of due process under the federal constitution resulted because of lack of substantial evidence before the Commission. While he went to great lengths in his petition before the California Supreme Court to urge that the Commission's order was not based upon substantial evidence, he claimed only that this resulted in the Commission's exceeding its authority under the state statute, (see p. 18 et seq. Pet. for Writ in State court). His alleged federal due process argument

Section 3774,[37] the Commission could have revoked petitioner's permits rather than fining him $1,000, upon a finding that he had violated provisions of the Code.[38] The general purpose of this section is to endow the Commission with sufficient power to enforce the various provisions of the Code.[39]

Petitioner's constitutional argument that he was denied equal protection of the law is based on an assertion that the effect of the Commission's order conditioning his permits is to treat him differently than others "similarly situated."[40] This argument fails as there are apparently no other carriers "similarly situated". No other carriers are offering this shipper 50 percent of their services gratis. If other carriers "similarly situated" did exist, they obviously would be subject to the same restrictions as petitioner. In short, the basis of the classification petitioner complains of is the relationship of the carrier to his only shipper. This cannot be called an unreasonable or arbitrary basis considering all of the evidence.[41] (Cf. *Morey v. Doud*, 354 U.S. 457 (1957).

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below was restricted to an allegation that the Commission was applying section 3800 retroactively by ordering him to discover and collect past undercharges, an argument he has abandoned before this Court.

37. Appearing at p. 5 of Pet. App.

38. See Commission's Order in Appendix in Respondent's *Answer* before California Supreme Court at page 13, where one commissioner, dissenting, urged that petitioner's permits ought to have been revoked rather than a fine imposed.

39. *Cornall v. Reilly*, 127 Cal. App. 2d 178, 272 P. 2d 572 (1954).

40. Page 29, Pet.

41. In enforcing Section 3668 of the Public Utilities Code, the Commission has repeatedly struck down any contrivance or device which gives a shipper an unfair economic advantage and in so doing has been upheld; see *J & V Trucking Co.*, 59 Cal. P.U.C. 337; *Direct Delivery System*, 54 Cal. P.U.C. 258; *Soule Transportation, Inc.*, 59 Cal. P.U.C. 260, Pet. for Rev. denied S.F. No. 21024;

III. Under 28 U.S. Code Section 1651(a), This Court Has No Jurisdiction to Issue a Common Law Writ of Certiorari to the California Public Utilities Commission Directing It to Certify to This Court That Portion of the Record of This Case Not Certified to the California Supreme Court by Said Commission When That State Court Denied Petitioner's Writ of Review.

Petitioner requests the extraordinary common law writ of certiorari issue from this Court to either California's Supreme Court or to respondent Commission[42] so that the transcript of the hearing in this case, as well as the Commission's staff counsel brief submitted to the examiner who conducted that hearing, should be certified to this Court as part of the official record before it.[43] Aside from the fact that this Court cannot consider what was not before the California State Supreme Court in reviewing this case,[44] respondent urges that 28 U.S. Code Section 1651(a) does not confer jurisdiction on this Court to grant petitioner's prayer for this extraordinary writ in this instance. While it is conceded that such a writ might issue from this Court against any state supreme court in aid of this Court's appellate jurisdiction should such state court refuse to certify the record before it to this Court in any case brought up for review,[45] in the instant case, the documents sought

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Southern California Lumber Transport, 50 Cal. P.U.C. 826, Pet. for Rev. denied S.F. No. 20076; *R. W. Jones, Jr.*, 60 Cal. P.U.C. 826 Pet. for Rev. denied S.F. No. 21437; *Alhambra Trucking Co.*, 60 Cal. P.U.C. 644, Pet. Rev. denied, S.F. No. 21440, app. dism. 379 U.S. 14 (1964).

42. Pet. p. 2.

43. Both documents reproduced in petitioner's Appendix at pp. 19 and 29.

44. Discussed supra at pp. 4, 7.

45. See *In re Summers*, 325 U.S. 561 (1945). No extraordinary writ was involved there. Petitioner's reliance on this case is misplaced. That case involved a petition for the usual writ of certiorari. There petitioner asked this Court to review the action of the Su-

by petitioner were concededly *never* before the state court but are now and have been in the exclusive custody of respondent.[46]

It is submitted that this Court and all federal courts were granted the power to issue extraordinary writs only in aid of federal jurisdiction already conferred. Hence Section 1651 cannot be read to amount to a new grant of power.[47] No federal court could issue such a writ against a state court except in aid of its federal appellate jurisdiction. In *Middlebrooks v. Thirteenth Judicial Dist. Circuit Court, Union City, El Dorado, Ark.*,[48] where the plaintiff, a federal prisoner, asked for an extraordinary writ to have himself produced in a state court, the court pointed out at page 486 of its per curiam opinion:

> "Federal courts of appeal are authorized to issue . . . extraordinary writs only in aid of their appellate jurisdiction, either existing or potential (28 U.S. Code Section 1651(a)). As to the state charges or proceedings pending against petitioner, there is, of course, no existing appellate jurisdiction in this (federal) court, nor is it potentially possible that any such jurisdiction could come to exist. The actions of the state court are completely outside the field in which we can make judicial review and correction."

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preme Court of Illinois which had denied his prayer for admission to practice law in Illinois. There the record in question had been made in the Supreme Court of Illinois as no orginal forum existed below. The record brought up to this Court was that which was before the Illinois Supreme Court, not some part of a record which that state court did not have and had never considered.

46. Pet. p. 32.

47. *Edgerly v. Kennely*, CA Ill 1954, 215 F. 2d 420, cert denied 348 U.S. 738; *U.S. ex rel State of Wisconsin v. First Federal Savings and Loan Ass'n.*, CA Wis 1957, 248 F. 2d 804, cert denied 355 U.S. 957.

48. (C.A. Ark. 1963) 323 F. 2d 485.

In *In re Previn,*[49] the court construed the code section thusly:

> "The basic purpose of section 1651 and of its statutory predecessors, was to assure to the various federal courts, the power to issue appropriate writs and orders of an auxiliary nature in aid of their respective jurisdictions as conferred by other provisions of law."

This Court has clearly and repeatedly emphasized that such extraordinary writs are proper only to correct jurisdictional error on the part of a lower court[50] and are only to be used when, for some special reason, remedy by appeal does not provide an adequate remedy.[51] This Court has held that such writs cannot be used to obtain review of military tribunals[52] nor to review orders made by executive officers of the federal government.[53] Neither are such writs available to annul alleged invalid municipal ordinances.[54] When a state court attempted to rely on the extraordinary writ of common law certiorari to compel a federal trial court to certify its records to it, the Federal District Court struck down such an assertion of power in *Superior Court of State of California in and for Los Angeles County v. U. S. Dist. Court, Northern District of California, Southern Division.*[55]

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49. 1 Cir. 204 F. 2d 417 at 418.

50. *United States Alkali Assoc. v. U.S.* (N.Y. 1945), 325 U.S. 196 at 202.

51. *Ex parte Fahey,* 332 U.S. 258; see also cases reviewed in Wolfson, *Extraordinary Writs in the Supreme Court since Ex Parte Peru,* 51 Col. L. Rev. 977 (1951).

52. *Ex parte Vallandigham,* 1864, 1 Wall. 243, 251; *In re Vidal, Porto Rico,* 1900, 179 U.S. 126.

53. *Mickadiet v. Payne* (App. D.C. 1920), 269 F. 194, aff. 258 U.S. 609.

54. *Borden's Condensed Milk Co. v. Baker* (N.J. 1910), 177 F. 906, 101 CCA 186.

55. (C.A. Cal. 1958) 256 F. 2d 844.

At page 847 of its opinion the court explained:

> "The issuance of a writ of certiorari by a federal district court directed to a state court is unprecedented . . . . under the Federal Constitution, its use has been confined exclusively to the United States Supreme Court and directed to the 'inferior courts' of the federal system or to the final appellate tribunals of a state solely when a question under the paramount authority of that instrument was involved. . . . . The federal court cannot command the state court to produce its record. The state court cannot command a federal court to produce its record."

Petitioner here has misconceived this Court's jurisdiction to issue the extraordinary writ of common law certiorari under 28 U.S. Code Section 1651(a) in the instant case. Petitioner is asking this Court to order certification of a record *not* before a final appellate tribunal of a state. The documents in question were not there for two reasons: (1) petitioner did not present them to that state tribunal when he might have done so, as was indicated supra, thus preserving them for review before this Court, and (2), minus petitioner bringing them before that court, a specific state statute only requires their presence before the state court when that court exercises its discretion to grant a Writ of Review.[56]

The statutory scheme for judicial review of respondent Commission's decision by the California Supreme Court has not been brought under federal constitutional attack by petitioner. This was the only avenue available to him to raise the instant issue, not by the prayer for an extraor-

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56. See PUC § 1756. This code section requires the Commission to certify its record to the California Supreme Court *only* in cases where that Court grants a petition for writ of certiorari or review; see Pet. App. p. 2.

dinary writ which if granted by this Court would successfully nullify the effect of such a statutory scheme. Perhaps petitioner did not take this avenue of attack because the precise issue it would raise has been resolved by this Court in favor of the constitutionality of California's statutory scheme for review of respondent Commission's decisions.[57]

Petitioner had the opportunity to have the transcript of this case available to this Court and any other document before respondent by the simple device of reproducing them in his Petition for Review before the California Supreme Court as he has now done in his petition to this Court. It must be assumed that he felt his appeal to the state court was not jeopardized by their absence. He cannot be heard to claim jeopardy on his further appeal to this Court. This Court would be nullifying a state statute if it should grant petitioner's prayer. It does not lie within this Court's jurisdiction to produce such a result through the device of an extraordinary writ issued under 28 U.S. Code Section 1651(a).

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57. *Lehigh Valley R.R. Co. v. Public Utility Commissioners,* 278 U.S. 24 (1928) affirming *Napa Valley Electric Co. v. Railroad Commission of the State of California,* 251 U.S. 366; see also *Alhambra Trucking Co. et al. v. Public Utilities Commission,* pet. for cert. denied 379 U.S. 14 (1964).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this motion for leave to file a petition for a common law writ of certiorari and for a writ of certiorari should be denied.

Respectfully submitted,

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January 4, 1966

(Appendix Follows)

Appendix

Public Utilities Code Section 1732. The application for a rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful. No corporation or person shall in any court urge or rely on any ground not set forth in the application.

Public Utilities Code Section 3572. Any highway carrier desiring a permit to operate as a highway contract carrier or a radial highway common carrier shall file a petition therefor with the commission. The petition shall set forth:

(a) The name and address of the applicant.

(b) The names and addresses of its officers, if any.

(c) Full information concerning the financial condition and physical properties of the applicant.

(d) Such other information necessary to the enforcement of this chapter as the commission may require.

Before a permit is issued, the commission shall require that the applicant establish financial responsibility. The commission may, with or without hearing, issue or refuse to issue the permit. If the commission finds that the applicant possesses the required financial responsibility to perform the operations proposed, it shall issue a permit. The Commission may attach to the permit such terms and conditions as, in its judgment, are required to assure protection to persons utilizing the operations.

Except as otherwise provided in this chapter, upon compliance by an applicant with this chapter, the commission shall issue a permit.

Public Utilities Code Section 3662. The commission shall, upon complaint or upon its own initiative without complaint, establish or approve just, reasonable, and non-

discriminatory maximum or minimum or maximum and minimum rates to be charged by any highway permit carrier for the transportation of property and for accessorial service performed by it.

In establishing or approving such rates the commission shall give due consideration to the cost of all of the transportation services performed, including length of haul, any additional transportation service performed, or to be performed, to, from, or beyond the regularly established termini of common carriers or of any accessorial service, the value of the commodity transported, and the value of the facility reasonably necessary to perform the transportation service.

Public Utilities Code Section 3801. Every highway permit carrier and every officer, director, agent, or employee of any highway permit carrier who violates or who fails to comply with, or who procures, aids, or abets any violation by any highway permit carrier of any provision of this chapter, or who fails to obey, observe, or comply with any order, decision, rule, regulation, direction, demand, or requirement of the commission, or of any operating permit issued to any highway permit carrier, or who procures, aids, or abets any highway permit carrier in its failure to obey, observe, or comply with any such order, decision, rule, regulation, direction, demand, requirement, or operating permit, is guilty of a misdemeanor, and is punishable by fine of not more than five hundred dollars ($500) or by imprisonment in the county jail for not more than three months, or both.